90-1676

No. _____

FILED
APR 29 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

MARY GADE, Director of the
Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ROLAND W. BURRIS
Attorney General of Illinois

ROSALYN B. KAPLAN
Solicitor General
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698

Attorneys for Petitioner

JOHN A. SIMON *
Assistant Attorney General
100 W. Randolph Street
13th Floor
Chicago, Illinois 60601
(312) 814-3672
Of Counsel.

* Counsel of Record.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether section 18 of the Occupational Safety and Health Act precludes Illinois from promoting public safety and environmental protection through the use of its traditional police power to license occupations merely because its licensing requirements also serve OSHA's purpose of worker safety?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE SEVENTH CIRCUIT'S FINDING OF EXPRESS PREEMPTION DIRECTLY CONFLICTS WITH THIS COURT'S AUTHORITY WHICH HOLDS THAT EXPRESS PREEMPTION EXISTS ONLY WHERE THE FEDERAL ACT CONTAINS EXPLICIT PREEMPTIVE LANGUAGE	8
II. THE SEVENTH CIRCUIT'S DECISION PRECLUDING ILLINOIS FROM PROMOTING PUBLIC SAFETY AND PROTECTING THE ENVIRONMENT THROUGH LICENSING ACTS WHICH ALSO FURTHER WORKER SAFETY IS CONTRARY TO THIS COURT'S AUTHORITY WHICH PERMITS STATE LAWS TO SUPPLEMENT FEDERAL LAWS	13
III. THE CONFLICTING AND WIDELY DIVERGENT DECISIONS OF THE FIRST, SECOND, THIRD AND SEVENTH CIRCUITS WARRANT THIS COURT'S EXERCISE OF ITS SUPERVISORY AUTHORITY TO RESOLVE THE IMPORTANT PUBLIC POLICY ISSUE OF OSHA PREEMPTION OF STATE PUBLIC SAFETY LEGISLATION	18

TABLE OF CONTENTS – Continued

	Page
CONCLUSION	23
APPENDIX	
Order of the Seventh Circuit Court of Appeals denying rehearing	App. 1
Opinion of the Seventh Circuit Court of Appeals	App. 3
Order of the United States District Court for the Northern District of Illinois, Eastern Division Granting Plaintiff's Motion to Clarify	App. 44
Judgment, Memorandum Opinion and Order of the District Court for the Northern District of Illinois, Eastern Division	App. 46
Constitutional Provision Involved	App. 63
Federal Statutes Involved	App. 63
The OSHA Hazardous Waste Operations Standard	App. 66
The Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act	App. 73
The Illinois Hazardous Waste Laborers Licensing Act	App. 87

TABLE OF AUTHORITIES

Pages

CASES

Associated Industries of Massachusetts v. Snow, 898 F.2d 274 (1st Cir. 1990) 20, 21

California v. ARC America Corp., 490 U.S. 93 (1989) .. 9, 13

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 13, 14

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) 14, 15

Dent v. West Virginia, 129 U.S. 114 (1899) 13

English v. General Electric Co., ___ U.S. ___, 110 S.Ct. 2270 (1990) 9, 10, 14, 15

Environmental Encapsulating Corp. v. New York City, 855 F.2d 48 (2nd Cir. 1988) 19, 20

Ferguson v. Skrupa, 372 U.S. 726 (1963) 13

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 15

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 11

New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587 (3rd Cir. 1985) ("*Hughey* I"), appeal after remand, 868 F.2d 621 (3rd Cir. 1989) ("*Hughey* II"), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3246 (1989) 18, 19

Pacific Gas and Electric Co. v. State Energy Resources Comm'n, 461 U.S. 190 (1983) 9, 20

Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp., 485 U.S. 495 (1988) 9

TABLE OF AUTHORITIES – Continued

Page

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) .. 9, 11

United Steelworkers of America v. Auchter, 763 F.2d 728 (3rd Cir. 1985) 15-16

STATUTES AND REGULATIONS

Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 651(b) 3, 14

Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 667 (Section 18) ..... *passim*

Superfund Amendments and Reauthorization Act of 1986, 29 U.S.C.A. § 655 note (West Supp. 1990) 3

Employee Retirement Income Security Act, 29 U.S.C.A. § 1144(a) 9

Emergency Petroleum Allocation Act, 15 U.S.C.A. § 751 9

The Solid Waste Disposal Act, 42 U.S.C.A. § 6901(a)(4) 13

OSHA Hazardous Waste Operations Final Rule, 29 C.F.R. § 1910.120 (1990) 3, 4, 11, 12

OSHA Hazard Communication Standard, 29 C.F.R. § 1910.1200(a)(2) (1990) 9, 18

OSHA Electrical Standard, 29 C.F.R. § 1910.301 (1990) 16

OSHA Proposed Occupational Exposure to Bloodborne Pathogens Standard, 54 Fed. Reg. 23042 (May 30, 1989) (to be codified at 29 C.F.R. § 1910) 17

TABLE OF AUTHORITIES – Continued

Page

Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7701-7717 ..... *passim*

Hazardous Waste Laborers Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7801-7815..... *passim*

Illinois Administrative Procedure Act, Ill. Rev. Stat. 1989, ch. 127, par. 1001 *et seq.* 7

No. _____

In The

Supreme Court of the United States

October Term, 1990

MARY GADE, Director of the
Illinois Environmental Protection Agency,

Petitioner,

v.

NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on November 14, 1990.

OPINIONS BELOW

The January 29, 1991 order of the United States Court of Appeals for the Seventh Circuit denying Petitioner's

petition for rehearing is not published, but is reprinted in the appendix hereto. (Pet. App. 1).

The November 14, 1990 opinion of the United States Court of Appeals for the Seventh Circuit is reported *sub nom. National Solid Wastes Management Association v. Killian*, 918 F.2d 671 (7th Cir. 1990), and reprinted in the appendix hereto. (Pet. App. 3).

The August 30, 1989 order of the United States District Court for the Northern District of Illinois, Eastern division granting Plaintiff's Motion to clarify and amend the judgment of the District Court is not reported but is reprinted in the appendix hereto. (Pet. App. 44).

The August 14, 1990 judgment, memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported but is reprinted in the appendix hereto. (Pet. App. 46).

JURISDICTION

The Court of Appeals for the Seventh Circuit entered its judgment on November 14, 1990. On January 29, 1991, the Court denied the Illinois Environmental Protection Agency's petition for rehearing and suggestion for rehearing *en banc*. This Petition for a Writ of Certiorari is filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2.

The Occupational Safety and Health Act, 29 U.S.C.A. §§ 651(b), 667(a) and 667(b).

The Superfund Amendments and Reauthorization Act of 1986, 29 U.S.C.A. § 655 note (West Supp. 1990)

The Occupational Safety and Health Administration Final Rule on Hazardous Waste Operations and Emergency Response. 29 C.F.R. §§ 1910.120(a) and 1910.120(e) (1990).

The Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7701-7717.

The Illinois Hazardous Waste Laborers Licensing Act, Ill. Rev. Stat. 1989, ch. 111, pars. 7801-7815.

The above constitutional provision, statutes and regulation are reproduced in the appendix. (Pet. App. 63).

STATEMENT OF THE CASE

The Petitioner, Mary Gade[1] is the Director of the Illinois Environmental Protection Agency (hereinafter

[1] Mary Gade succeeded former IEPA Director Bernard Killian. She is automatically substituted as a party pursuant to Sup. Ct. R. 35.3. Neil F. Hartigan, former Illinois Attorney General, whose name appears in the caption of the published Court of Appeals opinion, was dismissed as a party-defendant by order of the District Court entered on February 8, 1989, and is therefore not a Petitioner herein. (R. Doc. 28).

"IEPA"). She is charged with the administration and enforcement of the Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act and the Illinois Hazardous Waste Laborers Licensing Act (hereinafter "Illinois licensing acts"). Ill. Rev. Stat. 1989, ch. 111, ¶¶ 7701-7717 and Ill. Rev. Stat. 1989, ch. 111, ¶¶ 7801-7815. (Pet. App. 73). The Respondent, National Solid Wastes Management Association, (hereinafter "NSWMA"), is a national trade association of business entities whose principal business is removing, transporting, disposing, and handling of waste material, including hazardous waste. (R. Doc. 1, p. 2).

NSWMA alleged in its complaint that the training requirements of both Illinois licensing acts were preempted by the Occupational Safety and Health Administration Rule on Hazardous Waste Operations, 29 C.F.R. § 1910.120 (1988). (R. Doc. 1, p. 10). NSWMA further alleged that the Illinois licensing acts violated the Commerce Clause. (R. Doc. 1, p. 12). The IEPA responded that the Illinois licensing acts were not preempted because they served the state's interests of promoting public safety and protecting the environment, both of which are beyond the scope of OSHA regulation. (R. Docs. 21, 25). The IEPA also asserted that the allegations based on the Commerce Clause were premature. (*Id.*).

The facts relevant to this appeal are undisputed. The expert witnesses for NSWMA acknowledged that work on hazardous waste sites presents a wide variety of hazards to the surrounding community, the environment, and to the workers. (R. Doc. 73-1, pp. 32, 81-84). NSWMA experts also testified that the OSHA hazardous waste

operations final rule was comprehensive. (*Id.* at pp. 65-66).

The IEPA's expert witness, an eighteen-year veteran crane operator and hazardous materials training instructor, explained how inadequate work practices on the hazardous waste sites threaten the public safety. (R. Doc. 73-2, pp. 138-139). He testified that: (1) failure to decontaminate workers and their equipment could bring the hazardous wastes into contact with the public (*id.* at pp. 147-148); (2) failure to properly seal and pack hazardous wastes could result in spilling in transit (*id.* at pp. 149-150, 156); (3) rainwater run-off could carry toxins off site (*id.* at pp. 144-145); and (4) an explosion or fire could result from mishandling of dangerous wastes thereby producing noxious fumes (*id.* at pp. 143-144).

The District Court declared the Illinois licensing acts not preempted, with one exception which is not at issue herein.[2] The court concluded that the state regulation is not preempted by OSHA regulations "to the extent there exists a legitimate and substantial purpose apart from promoting job safety." (Pet. App. 54). The District Court also held that NSWMA's challenge to the 4,000 hour requirement in the Crane Operator's Licensing Act was premature. (Pet. App. 62). NSWMA appealed the District Court's decision. (R. Doc. 68).

---

[2] The District Court struck the words "within Illinois" from the Illinois licensing acts because the requirement that training be conducted "within Illinois" did not promote any legitimate and substantial state purpose. (Pet. App. 58). The IEPA did not appeal this decision.

A divided panel of the Seventh Circuit Court of Appeals reversed the decision of the District Court. (Pet. App. 4). The majority framed the question before it as follows: "whether the assertion of a proper state purpose will prevent a state law or regulation pertaining to worker health and safety from being preempted by an OSHA standard." (Pet. App. 21-22) The Court considered the three different approaches taken by the First, Second, and Third Circuits to this question and rejected all three. (Pet. App. 29-30). The Seventh Circuit developed its own two-part test:

> First, we determine whether the challenged state law or regulation constitutes, in a direct, clear and substantial way, regulation of worker health and safety * * * . Second, we attempt to extricate from the state law or regulation and invalidate those provisions that relate to worker health and safety in a direct, clear and substantial way. In this connection, we must strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed.

(Pet. App. 19). The Court held the Illinois requirement that hazardous waste crane operators have 4,000 hours of operating experience expressly preempted under this test based on a finding that there is "no way to separate the worker health and safety aspect of the requirement from the public health and safety aspect." (Pet. App. 32).

Judge Easterbrook, *dubitante*, did not agree with the majority's premise that section 18 of the OSH Act, 29 U.S.C.A. § 667, expressly preempts states from adding to OSHA regulation. He stated: "I cannot join an opinion that shortstops the inquiry by calling § 18 'clear' . . . "

(Pet. App. 42). Judge Easterbrook concluded that neither a rule of statutory construction, nor the decisions of the other three circuits, nor the legislative history of the OSH Act answered the question whether section 18 precludes a state from adding to OSHA regulation.

The Seventh Circuit remanded the case and directed the District Court to apply the test developed in the majority opinion. The majority believed that the IEPA had promulgated implementing regulations giving the Illinois statutes concrete form. (Pet. App. 32). The IEPA has not promulgated any implementing regulations. Indeed, the IEPA has not even taken the first step of publishing proposed regulations in the Illinois Register. Rulemaking by the IEPA must comply with the procedures set forth in the Illinois Administrative Procedure Act, including consideration by the Joint Committee on Administrative Rules, a committee of the Illinois General Assembly. Ill. Rev. Stat. 1989, ch. 127, ¶ 1001 *et seq.* As there is no prospect for any such "implementing regulations" in the foreseeable future, there is nothing more for the District Court to decide on remand and no purpose would be served by delaying this Court's review of the decision of the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

Historically, the safety and health hazards in and around the workplace threatened only the workers themselves. Developments in technology have changed this fundamental fact. The presence of harmful substances in many of the workplaces of today also seriously threatens

the public safety because of the effect that these extremely toxic substances have on the general environment.

Many state and local governments have responded to this growing threat by enacting public safety legislation which also promotes worker safety. The fact that other states have enacted legislation addressing these public safety concerns emphasizes their importance. Like Illinois, these other states have had their public safety legislation challenged on the grounds that it was preempted by OSHA. The prevalence of this issue is demonstrated by the fact that four different federal circuits have addressed it within just a few years. The Supreme Court's guidance on this widespread issue of public concern is needed. Furthermore, each of the four circuits has provided a different and conflicting answer to the question of whether OSHA preempts this growing body of public safety legislation. The widely divergent decisions of the four circuits warrant this Court's exercise of its supervisory authority to resolve the conflict among the circuits.

I. THE SEVENTH CIRCUIT'S FINDING OF EXPRESS PREEMPTION DIRECTLY CONFLICTS WITH THIS COURT'S AUTHORITY WHICH HOLDS THAT EXPRESS PREEMPTION EXISTS ONLY WHERE THE FEDERAL ACT CONTAINS EXPLICIT PREEMPTIVE LANGUAGE.

The Seventh Circuit's majority opinion construes section 18 of the OSH Act, 29 U.S.C.A. § 667, to "unquestionably preempt" and "expressly prohibit" states from adding to OSHA worker safety regulations despite the

fact that there is no explicit preemptive language in section 18. (Pet. App. 14, 17). This Court's authority consistently provides that express preemption exists only if that is the clear and manifest purpose of Congress and there is explicit preemptive language in the federal enactment.[3] *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270, 2275 (1990). *See also California v. ARC America Corp.*, 490 U.S. 93 (1989); *Pacific Gas and Electric Co. v. State Energy Resources Comm'n*, 461 U.S. 190 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). The fact that a federal regulation is comprehensive does not support a preemptive inference; "pre-emption, if it is intended must be explicitly stated." *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 504 (1988).

Section 18 contains no express or specific language which preempts state licensing or public health and safety acts such as the Illinois licensing acts. The fact that the majority resorted to an analysis of the legislative

---

[3] Where Congress intends to expressly preempt state law, it specifically states so in the federal act. *See, e.g.*, Employee Retirement Income Security Act, 29 U.S.C.A. § 1144(a), ("Supersedure . . . the provisions of this title . . . shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . "); Emergency Petroleum Allocation Act, 15 U.S.C.A. § 751, ("The regulation . . . shall preempt any provision . . . by any state . . . "). Federal agencies have also explicitly stated Congress' intent to preempt in their regulations. *See, e.g.*, Hazard Communication Standard, 19 C.F.R. § 1910.1200(a)(2) (1990), ("This occupational safety and health standard is intended to address comprehensively . . . and to preempt any legal requirements of a state . . . pertaining to this subject.").

history demonstrates the absence of any explicit preemptive language in the text of the federal act. The majority's searching analysis of congressional purpose is consistent with an implied preemption analysis; however, the Court did not find implied preemption. On the contrary, the court specifically found that "section 18 does not evidence a congressional intent to achieve uniformity in worker health and safety regulation." (Pet. App. 15).

Given the fact that states have only recently enacted public safety legislation which also regulates worker safety, there is no evidence that Congress actually contemplated that OSHA would be construed to preempt such state legislation. Yet, "[p]reemption fundamentally is a question of congressional intent." *English, supra*, 110 S.Ct. at 2275. Congress should first be given the opportunity to consider the importance of the states' concerns before the court so readily attribute to Congress the "clear" and "express" intent to preempt this emerging body of state public safety legislation.

Section 18(a) expressly provides that states are not preempted from regulating worker safety in some cases: "[n]othing in this chapter shall prevent any State . . . from asserting jurisdiction over any occupational safety or health issue with respect to which no [federal] standard is in effect." 29 U.S.C.A. § 667(a). The majority decision assumes that this anti-preemption clause, coupled with section 18(b), preempts everything it does not expressly save. In so doing, the majority appears to be finding express pree ption by negative implication. As Judge Easterbrook states, "[f]rom the listing in § 18(a) and 18(b) of two ways the state may apply its law, coupled with the preservation in § 4(b)(4), 29 U.S.C. § 653(b)(4), of

worker's compensation laws, the court infers that there are no others." (Pet. App. 36). This application of the maxim *expressio unius est exclusio alterius* has no force in the case at bar. First, while federal regulations of health and safety may in some instances provide all the protection necessary, the Agency did not believe that to be the case here. The regulation establishes a *minimum* requirement. "General site workers . . . shall receive a minimum of 40 hours of instruction . . . . " 29 C.F.R. § 1910.120(e)(3) (1990). Second, the majority's approach disregards this Court's long-standing authority that a state's exercise of its historic police powers is presumed not to be preempted. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960). Third and finally, as Judge Easterbrook points out: "To treat anti-preemption clauses as if they implicitly preempt all they do not save may invert the proper result." (Pet. App. 37).

The only mention of the word "preempt" in the OSH Act appears in the heading of Section 18(b):

> (b) Submission of State Plan for development and enforcement of State standards to preempt applicable Federal standards.

29 U.S.C.A. § 667(b). The plain language of this provision reflects Congress' intent to permit states to preempt federal occupational safety standards pursuant to OSHA authorized state plans which are at least as effective as the federal standards. Section 18 does *not* clearly reflect an intent to prohibit states which do not have OSHA authorized state plans from enacting supplemental occupational safety legislation which does not displace or

otherwise conflict with the federal standards. Judge Easterbrook correctly argued that Section 18(b) "sounds like an option for the states, not like a constraint." (Pet. App. 35). If the states wish to preempt the federal standards, they must submit a plan which is at least as effective at promoting worker safety; otherwise state regulation may only supplement or add to OSHA standards in a manner which does not conflict with OSHA. Illinois has not opted to preempt OSHA. The Illinois licensing acts further state goals of protecting the public safety and the environment as well as the additional goal of protecting workers.

Not only is there no express preemption language in the OSHA Act, there is also no such language in OSHA's final Hazardous Waste Operations rule. 29 C.F.R. § 1910.120. The Seventh Circuit acknowledged that although OSHA has in some cases declared its intent to preempt all state and local requirements on a particular aspect of worker health and safety, no such statement can be found in the Hazardous Waste Operations final rule. (Pet. App. 13). The Court further found that " . . . OSHA has explicitly attempted to avoid broad preemptive effect in promulgating the final rule here." (Pet. App. 14). The court's own findings undermine its conclusion that section 18 was intended to preempt state law. The court's decision that section 18 expressly preempts the Illinois licensing acts, notwithstanding the absence of any explicit language to that effect, is contrary to the long-standing authority of this Court and should be reversed.

II. THE SEVENTH CIRCUIT'S DECISION PRECLUDING ILLINOIS FROM PROMOTING PUBLIC SAFETY AND PROTECTING THE ENVIRONMENT THROUGH LICENSING ACTS WHICH ALSO FURTHER WORKER SAFETY IS CONTRARY TO THIS COURT'S AUTHORITY WHICH PERMITS STATE LAWS TO SUPPLEMENT FEDERAL LAWS.

The Seventh Circuit's decision in the case at bar denies to the states the traditional tool of occupational licensing as a means to protect the public safety and environment. The court acknowledged that "[t]he language of section 18 of the OSH Act does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted." (Pet. App. 14). The court further stated that the Illinois licensing acts are designed to "protect life, limb and property . . . ," which is a "valid state concern independent of worker health and safety." (Pet. App. 12). Nevertheless, the Seventh Circuit held that the OSH Act expressly preempted the Illinois licensing acts.

Federal courts rarely infer preemption of "state law in areas traditionally regulated by the states." *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989). Licensing and entry into an occupation have traditionally been regulated by the states. *Dent v. West Virginia*, 129 U.S. 114, 122 (1899); *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963). Furthermore, the Supreme Court has noted that the field of interstate waste management was not preempted by federal law and that the handling of wastes should continue to be primarily the function of state, regional and local agencies pursuant to the Solid Waste Disposal Act, 42 U.S.C. § 6901(a)(4). *City of Philadelphia v. New Jersey,*

437 U.S. 617, 621 n.4 (1978). Nevertheless, Illinois' decision to require licensing of hazardous waste crane operators and laborers was afforded no deference by the court.

The Seventh Circuit's decision is contrary to this Court's authority which dictates that the presence of a federal regulatory system does not imply that a state is precluded from enacting its own regulations. *English, supra,* 110 S.Ct. 2270. This Court affirmed the validity of state regulation which overlapped federal regulation in *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69 (1987). The issue in *CTS* was whether the federal Williams Act preempted Indiana's statute regulating takeovers. The Court of Appeals found preemption based on the fact that the Indiana act imposed a 50-day delay on the consummation of tender offers while the federal law provided a 20-day period. *Id.* at 76. The Supreme Court reversed the Court of Appeals and stated:

> Because it is entirely possible for entities to comply with both the Williams Act and the Indiana Act, the state statute can be found preempted only if it frustrates the purpose of the federal law.

Id. at 79. This Court examined the purpose of the federal law and determined that the state's stricter regulation did not frustrate the federal purpose; rather, it furthered the federal policy of investor protection. *Id.* at 82.

Similarly, in the case at bar, the Illinois licensing acts impose training, testing and experience requirements on certain hazardous waste workers which do not conflict with the federal training requirements. As the purpose of the OSH Act is "to provide safe and healthful working conditions," (29 U.S.C.A. § 651(b)), the Illinois licensing

acts clearly further the federal policy underlying OSHA. It is entirely possible to comply with both the Illinois licensing acts and the federal regulation. Therefore, the decision of the Seventh Circuit preempting the Illinois licensing acts conflicts with this Court's decision in *CTS.*

The decisions of this Court repeatedly hold that states are free to supplement federal requirements. In *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707 (1985), this court specifically explained that "[there is] a presumption [that] state and local regulation of health and safety matters can constitutionally coexist with federal regulation." *Id.* at 716. More recently, in *English* this Court stated that even the existence of a detailed federal regulatory scheme does not by itself imply preemption and "cannot mean . . . that every federal statute ousts all related state law." 110 S.Ct. at 2279. In the OSH Act itself, Congress has sanctioned the coexistence of certain state occupational regulation, such as worker compensation laws, with the OSHA standard on hazardous waste operations. 29 U.S.C.A. § 653(b)(4). The majority offers no explanation why the Illinois licensing acts cannot similarly coexist with the OSHA regulation.

There is no basis for the Seventh Circuit's assertion that the purpose of section 18 would be defeated if a state could impose measures stricter than OSHA's. The court's concern that "[s]uch unauthorized state regulation . . . could result in duplication and unwarranted additional costs . . . " (Pet. App. 18-19), is unfounded and was rejected by the Third Circuit in *United Steelworkers of America v. Auchter,* 763 F.2d 728 (3rd Cir. 1985), which found that Congress' intent was " . . . that the OSH Act

provide a federal floor for safety in the workplace." *Id.* at 734.

Furthermore, there are certain hazardous waste operations covered by the Illinois licensing acts that are not covered by the OSHA standard on hazardous waste operations. Because of OSHA's exclusive concern for employer-employee relationships, independent contractors who work on their own are not regulated by OSHA. For example, a landowner ordered by the state to remove thirty barrels of toxic materials from his property may engage John Brown, an experienced crane operator, to perform the removal project. Because Brown is a sole proprietor and hires no employees, the federal OSHA hazardous waste operations standard does not apply to the project. In contrast, under the Illinois licensing act, Brown would be required to demonstrate his competency through training and experience. Thus, by striking the Illinois licensing acts, the Seventh Circuit has removed certain hazardous waste work from any regulation whatsoever, thereby posing a threat to the public health and safety.

The consequences of the Seventh Circuit's decision spell disaster for a wide variety of state and local public health and safety legislation. For example, OSHA has promulgated an extensive safety standard relating to the general installation of electrical systems. 29 C.F.R § 1910.301 (1990). Provisions of the OSHA standard are duplicated in the National Electrical Code which is adopted, largely verbatim, by local building code authorities. The decision of the Seventh Circuit would in effect invalidate all of these local electrical codes. Furthermore, pursuant to the court's reasoning, all state and local

government laws licensing electricians would also be preempted since OSHA has issued a standard which prescribes the manner in which electrical equipment must be installed in the workplace.

Similarly, OSHA has issued a proposed rule governing occupational exposure to bloodborne pathogens, such as the HIV or Hepatitis B virus. 54 Fed. Reg. 23042 (May 30, 1989) (to be condified at 29 C.F.R. § 1910). The proposed OSHA bloodborne pathogen standard will require that all employees receive extensive training in the safe handling of infected and potentially-infected materials. Doctors, dentists, nurses, midwives, medical technicians, and embalmers who are also "employees routinely exposed to human blood" will be affected by the OSHA standard. (*Id.* at 23073). Applying the test for OSHA preemption developed by the Seventh Circuit, all of the state acts which license these professionals would be preempted by the new OSHA standard. Unquestionably, this is not the result intended by Congress, especially considering that the OSHA standard does not protect the public as adequately as do the state licensing acts.

Contrary to the suggestion of the Seventh Circuit, its decision presents more than a mere procedural obstacle to the state's efforts to regulate public safety and the environment. The Court's recommendation to Illinois that, if its interest in the public safety and environment is genuine, it need only submit its licensing acts to OSHA for approval is unrealistic. (Pet. App. 31-32). First, OSHA is not concerned with environmental and public safety issues. Second, OSHA has never approved a state plan on such a limited issue as occupational licensing. Finally, Illinois does not wish to displace OSHA occupational

health and safety standards. Accordingly, the decision of the Seventh Circuit in this case has serious and far reaching consequences on state public safety legislation.

III. THE CONFLICTING AND WIDELY DIVERGENT DECISIONS OF THE FIRST, SECOND, THIRD AND SEVENTH CIRCUITS WARRANT THIS COURT'S EXERCISE OF ITS SUPERVISORY AUTHORITY TO RESOLVE THE IMPORTANT PUBLIC POLICY ISSUE OF OSHA PREEMPTION OF STATE PUBLIC SAFETY REGULATION.

The four different circuit courts of appeals which have addressed the question of whether OSHA preempts state laws which regulate worker safety and public safety have produced four different answers. Prior to the decision of the Seventh Circuit, each succeeding decision further limited the preemptive effect of section 18 upon the state's exercise of its traditional police powers. The Seventh Circuit decision openly broke with this trend and preempted state law which concededly would have survived under the tests developed by each of the other three circuits.

The first federal court of appeals to rule on the preemptive effect of section 18 of the OSH Act on state regulation of worker safety *and* public safety was the Third Circuit in *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3rd Cir. 1985) ("*Hughey* I"), appeal after remand, 868 F.2d 621 (3rd Cir. 1989) ("*Hughey* II"), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3246 (1989). Unlike the OSHA standard involved in the case at bar, the OSHA Hazardous Communication standard at issue in *Hughey* expressly preempted state law pertaining to the subject. 29 C.F.R. § 1910.1200(a)(2) (1984). Nevetheless, the *Hughey* court upheld those provisions of the New Jersey

Act which had as their "primary purpose" the broader concerns of public safety and environmental protection.

The Third Circuit reasoned:

> Because OSHA standards by definition govern occupational safety and health issues, they do not preempt state laws that regulate other concerns. The Secretary has authority to promulgate standards only as to occupational safety and health and those standards cannot have a preemptive effect beyond that field. . . .

Hughey, 774 F.2d at 593.

The Seventh Circuit acknowledged that "[u]nder the Third Circuit's test, the 4,000-hour requirement might survive, since it is directed both to worker health and safety and to 'broader' concerns." (Pet. App. 29). Nevertheless, the Seventh Circuit held the Illinois 4,000 hour requirement expressly preempted. By invalidating Illinois' requirements which served the "dual purpose" of protecting workers and the public, the court rejected not only the Third Circuit's formulation of the test for preemption but, more importantly, it completely rejected the premise of that decision which was that Congress never intended OSHA to preempt state public safety and environmental protection laws.

The Second Circuit Court of Appeals was the next court to address the issue of OSHA preemption in *Environmental Encapsulating Corp. v. New York City*, 855 F.2d at 48 (2nd Cir. 1988). The Second Circuit agreed that OSHA can only preempt regulation in the area of occupational safety and health. Specifically it explained: "Local legislation enacted for the sole purpose of protecting the public health would not, on its face be preempted by the Act."

Id. at 55. The Second Circuit criticized the Third Circuit's test on the ground that: " 'primary' is an ambiguous word and to adopt its use leads down an unmarked avenue of inquiry into legislative motive, which is 'often an unsatisfactory venture.' " *Id.* at 57, citing *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Therefore, the Second Circuit developed a different test upholding local regulations for which there is a "legitimate and substantial purpose apart from protecting asbestos workers." *Environmental Encapsulating*, 855 F.2d at 57. The Second Circuit upheld training and testing requirements of the New York City ordinance because those provisions promoted the legitimate purpose of public safety in addition to the strictly worker safety purpose regulated by OSHA.

The Seventh Circuit acknowledged that the Second Circuit upheld local regulation of workers regulated by OSHA absent any OSHA approved State Plan when the local legislation served the dual purpose of protecting worker safety *and* public safety. (Pet. App. 30). Furthermore, the court expressly found that the challenged Illinois laws "directly, clearly and substantially implicated worker health and safety as well as public health and safety." (Pet. App. 29). Nonetheless, the Seventh Circuit invalidated the Illinois law.

The First Circuit Court of Appeals addressed the issue of section 18 preemption in *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990). As in the case at bar, the *Snow* case involved occupational licensing laws which required training and testing of workers already subject to OSHA regulation. The First

Circuit upheld the validity of almost all the more stringent Massachusetts requirements which had the effect of promoting public safety even though they accomplished this purpose by regulating workers. The First Circuit noted that the Third and the Second Circuit tests require inquiry into legislative intent. *Snow*, 898 F.2d at 279. Rather than attempting to divine the legislative purposes underlying the state law, the First Circuit focused its attention on the "effect" of the state law and formulated its test for section 18 preemption as follows:

> If the effect is to protect the public, the state regulation is not preempted. If the effect is solely to protect the workers, the OSHA standard prevails and the state regulation falls. If the effect is to protect the public by regulating workers and work places, the regulation stands because its ultimate effect is the protection of the public.

Snow, 898 F.2d at 280.

The test enunciated in *Snow* is an objective test which does not require inquiry into the state legislature's intent. It preserves the supremacy of the OSHA regulations in case of actual conflict with state law yet it leaves the states free to exercise the traditional police power of occupational licensing to protect the public. Nevertheless, the Seventh Circuit rejected the First Circuit's test for section 18 preemption on the grounds that even "the likelihood that a particular provision will have a beneficial effect upon the public health and safety" cannot save the provision. (Pet. App. 31).

As the foregoing decisions of the First, Second, Third, and now the Seventh Circuits reflect, there are currently

four different answers to the question of whether and to what extent section 18 of the OSH Act preempts state law. The First and Second Circuit's rejected the Third Circuit's test in favor of tests which further limited the preemptive effect of section 18. The Seventh Circuit, on the other hand, rejected the tests of each of the other circuits in favor of a test which broadens the preemptive effect of section 18. The widely divergent decisions of the four circuit courts on this issue demonstrate the need for this Court to authoritatively resolve this conflict.

Also, the fact that four different circuits have grappled with this issue within the last few years demonstrates the importance of this question of federal law. Indeed, in each case, thousands of workers are directly regulated by the state legislation and millions of others are directly affected by the public safety and environmental aspects of the legislation. This illustrates the far reaching consequences of this unresolved issue of federal law and the need for this Court's supervisory guidance.

CONCLUSION

For all the reasons stated above, Petitioner respectfully requests that this Honorable Court grant this petition for certiorari.

Respectfully submitted,

ROLAND W. BURRIS
Attorney General
State of Illinois

ROSALYN B. KAPLAN
Solicitor General
State of Illinois

JOHN A. SIMON*
Assistant Attorney General
100 West Randolph Street
13th Floor
Chicago, Illinois 60601
(312) 814-3672

*Counsel of Record.

April 29, 1991

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 29, 1991.

BEFORE
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. JOSEPH T. SNEED, Circuit Judge*

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, an Illinois not-for profit organization,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiff-Appellant,	)	
No. 89-3069 v.	)	
BERNARD KILLIAN, Director of the Environmental Protection Agency, an Illinois agency, in his representative capacity and NEIL F. HARTIGAN, Attorney General of the State of Illinois, in his representative capacity,	)	No. 88 C 10732
	)	James B. Zagel, *Judge.*
Defendants-Appellees.	)	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause and the response thereto, no judge in active

---

* The Honorable Joseph T. Sneed of the Ninth Circuit is sitting by designation.

service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, an Illinois not-for-profit corporation, Plaintiff-Appellant,

v.

Bernard KILLIAN, Director of the Environmental Protection Agency, an Illinois agency, in his representative capacity and Neil F. Hartigan, Attorney General of the State of Illinois, in his representative capacity, Defendants-Appellees.

No. 89-3069.
United States Court of Appeals,
Seventh Circuit.
Argued May 14, 1990.
Decided Nov. 14, 1990.
Rehearing and Rehearing En Banc
Denied Jan. 29, 1991.

Before CUDAHY and EASTERBROOK, Circuit Judges, and SNEED, Senior Circuit Judge.[1]

CUDAHY, Circuit Judge.

National Solid Wastes Management Association ("NSWMA") challenges the constitutionality of certain Illinois laws providing for the training, testing and licensing of hazardous waste site workers. According to NSWMA, the Illinois laws are preempted by the Occupational Safety and Health Act, 29 U.S.C. § 655 *et seq.* (the "OSH Act"), and regulations promulgated by the Occupational Safety and Health Administration ("OSHA"), and the Illinois acts also violate the commerce clause of the Constitution. U.S. Const. art. I, § 8, cl. 3. The district court

---

[1] The Honorable Joseph T. Sneed of the Ninth Circuit is sitting by designation.

upheld the Illinois legislation, striking one provision. We affirm in part and vacate in part.

I. Relevant Statutes and Regulations and Proceedings Below

In recent years, popular concern about the environment has spurred legislators at all levels of government to enact laws aimed at abating existing pollution and preventing the creation of more pollution. In particular, legislators have focused on the special problems posed by so-called "hazardous" wastes. Congress has passed several measures designed to control and clean up hazardous wastes. *E.g.*, Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 *et seq.*; Resource Conservation and Recovery Act ("RCRA") and Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6901 *et seq*. State and local governments, too, have addressed themselves to this important need.

Environmental measures enacted by state and local governments often address matters not covered by federal legislation or establish environmental standards higher than those provided by Congress. Many (if not most) states have created their own environmental protection agencies. The resulting patchwork of legislation and regulation emerging from government at various levels and reflecting different approaches to control has repeatedly generated issues of federal preemption of state and local laws, *see, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883

(1987), and state and local interference with interstate commerce, *see, e.g., Philadelphia v. New Jersey*, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). Congress has in some specific instances expressed its intent to preempt particular kinds of state and local legislation, but is has not yet declared (or implied) its intention to occupy the entire field of environmental regulation. Consequently, courts have been obliged to address alleged conflicts between national and local legislation on a statute-by-statute (or regulation-by-regulation) basis. This is the background against which we now proceed to examine NSWMA's preemption and commerce clause challenges to the Illinois licensing statutes.

A. *The Illinois Licensing Acts*

In 1988, Illinois enacted the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, Ill.Rev.Stat. ch. 111, ¶7701 *et seq.* (the "Operators Act"), and the Hazardous Waste Laborers Licensing Act, Ill.Rev.Stat. ch. 111, ¶7801 *et seq.* (the "Laborers Act"). The Illinois General Assembly found that these two licensing acts would "promote job safety and . . . protect life, limb and property. . . . " Ill.Rev.Stat. ch. 111, ¶¶7702, 7802. The Operators Act covers persons working with cranes and hoists capable of lifting more than two tons, as well as their apprentices. The Laborers Act applies to all other general employees working at a hazardous waste cleanup site. Both acts require a license applicant to provide a certified record of at least 40 hours of training in order to work with hazardous waste under a program conducted within Illinois which has been approved either by the

Illinois Environmental Protection Agency ("IEPA") or by the United States Environmental Protection Agency ("EPA"). Further, the applicant must be at least 18 years old, must not have violated any provisions of the relevant act and must pass a written examination "prescribed by" IEPA. *Id.* at ¶¶7705, 7706, 7805. Applicants for the Operator's License (but not apprentices) must clear another hurdle: they must submit "a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours. . . . " *Id.* at ¶7705(d). Each year, all licensees must complete a refresher course of at least 8 hours of instruction in order to obtain renewal of their state license. *Id.* at ¶¶7707(b), 7806(b). The acts do not require licensing of persons working with equipment incapable of lifting more than 2 tons, persons engaged in agricultural or mining activities, persons employed by railroads or persons employed by the owner of a manufacturing facility undergoing cleanup pursuant to federal or state environmental laws so long as such employees have completed the training required by OSHA's Hazardous Waste Operations and Emergency Response regulations, 29 C.F.R. § 1910.120 (1989). *Id.* at ¶¶7704, 7804.

The acts also authorize the imposition of penalties for specified conduct. An employee subject to the acts who operates without a license, or an employer who knowingly permits such an individual to work without a license, may be fined from $1000 to $5000, depending on the existence of any previous such offenses. *Id.* at ¶¶7715, 7716, 7814. In addition, an individual's license may be suspended, revoked or denied renewal and the individual fined up to $5000 for obtaining or attempting to

obtain a license by fraud; for committing gross negligence or demonstrating incompetence or misconduct in handling hazardous waste; for being convicted of any felony or being subject to a court order of involuntary commitment in a mental health facility; for failing to comply with any provision of the relevant Illinois act or for refusing to provide IEPA with information requested pursuant to a complaint or investigation; or for having one's operator's, apprentice's or laborer's license revoked in any other state. *Id.* at ¶¶7711, 7810. Under the acts, it is a public nuisance to perform work at a hazardous waste site or to operate or assist in the operation of a crane or hoist at a hazardous waste site without a license, and the Illinois Attorney General, the director of IEPA, any state's attorney or any resident citizen may bring a court action to enjoin an individual from working at a hazardous waste site without a license. *Id.* at ¶¶7714, 7813.

Finally, each act creates a five-member licensing board and provides for the appointment of an inspector to investigate accidents, monitor hazardous waste sites for compliance with the relevant act and provide advice to the relevant licensing board. The boards are to include two representatives of the relevant labor union or unions, two hazardous waste industry representatives and one member of the general public. Board members serve four-year terms and receive no salary for their service. Three members constitute a quorum, and the boards may submit recommendations to the director of IEPA concerning any aspect of the relevant licensing scheme. *Id.* at ¶¶7709, 7710, 7808, 7809.

B. *The OSHA Regulations*

In SARA, Congress authorized the Secretary of Labor to "promulgate standards of the health and safety protection of employees engaged in hazardous waste operations." SARA, Pub.L. No. 99-499, Title I, § 126(a), 100 Stat. 2690 (1986) (as amended Pub.L. No. 100-202, § 101(f), Title II, 101 Stat. 1329-198 (1987)). Section 126(a) of SARA directed the Secretary of Labor to promulgate the standards pursuant to section 6 of the OSH Act, 29 U.S.C. § 655. Specifically, SARA required the Secretary to establish standards for site analysis, training, medical surveillance, protective equipment, engineering controls, maximum exposure limits, informational and new technology programs, handling of hazardous wastes, decontamination procedures and emergency responses. OSHA's Hazardous Waste Operations and Emergency Response regulations, 29 C.F.R. § 1910.120 (1989) (the "final rule"), are the product of this command. In addition to the subjects mandated by SARA, OSHA has also promulgated regulations pertaining to minimum illumination of worksites, monitoring of employee exposure levels and sanitation at temporary worksites.

NSWMA asserts that OSHA's regulations are "comprehensive," and draws our attention particularly to OSHA's worker training requirements contained in subsection (e) of the final rule. Subsection (e) requires training of all employees and supervisors working in the field (that is, with, or in close proximity to, the hazardous wastes). Initially, general site workers engaged in an activity that may potentially expose them to hazardous wastes must receive at least 40 hours of off-site training

and three days of actual field experience under the supervision of a trained and experienced supervisor. 29 C.F.R. § 1910.120(e)(3)(i). Workers who are on the site only occasionally or who are working in areas that have been determined to be under the permissible exposure limits must complete at least 24 hours of off-site instruction and one day of actual field experience. *Id.* at §§ 1910.120(e)(3)(ii) and (iii). Managers and supervisors receive the same amount of off-site training and field experience as general workers, depending on whether they will be on site frequently or only occasionally, or whether they will be working in areas under the minimum exposure levels. In addition to this training, managers and supervisors must complete at least eight additional hours of specialized training on topics that include the employer's safety and health program, the personal protective equipment program, the spill containment program and health hazard monitoring procedures and techniques. *Id.* at § 1910.120(e)(4).

Neither section 126 of SARA nor the OSHA final rule expressly declares that OSHA has exclusive authority to regulate on the subject of hazardous waste workers' health and safety. However, the OSH Act contains a general preemptive provision that states, in relevant part:

> (a) Assertion of State standards in absence of applicable Federal standards
>
> Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State Plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667 (hereinafter "section 18").[2]

C. *The District Court's Decision*

The district court conducted an evidentiary hearing at which both sides of this dispute submitted expert testimony. On the basis of the facts presented and his interpretation of the applicable law, the district judge concluded that Illinois licensing statutes were neither expressly nor implicitly preempted by federal law, except for the requirement that training be conducted within Illinois. The district judge struck the "within Illinois" provision because it could not contribute to Illinois's stated purpose of protecting public health.[3] The district

---

[2] Although it was SARA that authorized the creation of the final rule at issue here, section 18 of the OSH Act applies to the standards because they are promulgated under section 655 of title 29, as directed by section 126(a) of SARA.

[3] The Illinois defendants do not appeal from the district court's decision striking the "within Illinois" provision. It seems likely to us, in any event, that the "within Illinois"

(Continued on following page)

judge refused, however, to consider NSWMA's commerce clause challenge because he believed the claim was not yet ripe since Illinois had not yet promulgated final rules for implementing the licensing statutes. On appeal, NSWMA contests the district court's analysis and renews its argument that the Illinois statutes should be stricken in their entirety on the basis either of federal preemption or of the commerce clause.

II. NSWMA's Preemption Challenge

Preemption doctrine derives from the supremacy clause of the Constitution, U.S. Const. art. VI, cl. 2. NSWMA first argues that the OSHA final rule itself expresses preemptive intent, or, in the alternative, that section 18(b) of the OSH Act preempts the Illinois scheme because Illinois admits it has not submitted a plan pursuant to that section. NSWMA next contends that, even if the Illinois acts are not expressly preempted, they are implicitly preempted. In support of this theory, NSWMA asserts that Congress has "occuppied the field" of worker health and safety regulation and that, in any event, the Illinois acts actually conflict with the OSHA final rule.

Federal regulations, like federal statutes, may preempt state or local laws. *Hillsborough County v. Automated*

(Continued from previous page)

provision could not have survived NSWMA's commerce clause challenge, since the provision would have imposed a substantial burden on out-of-state workers and companies while making no discernible contribution to public safety. *See Raymond Motor Transp., Inc, v. Rice*, 434 U.S. 429, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978).

Medical Labs, Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). Courts do not, however, lightly attribute to Congress or to a federal agency the intent to preempt state or local laws. Indeed, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest* purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947) (emphasis added). Environmental regulation has long been recognized as an "historic police power[] of the States." *See Huron Cement Co. v. City of Detroit*, 362 U.S. 440, 442, 80 S.Ct. 813, 815, 4 L.Ed.2d 852 (1960). As we have observed, states continue to play a significant role in pollution prevention and abatement.

Illinois has stated that the licensing acts are designed "to promote job safety *and to protect life, limb and property*. . . . " Ill.Rev.Stat. ch. 111, ¶¶7702, 7802 (emphasis added). The italicized portion of the state's declared goal certainly expresses a valid state concern independent of worker health and safety. The difficulty we face here lies in determining whether a state law or regulation that addresses the same topic as a duly-promulgated OSHA regulation[4] may survive preemption simply because the state has asserted that its legislation is designed to achieve a legitimate state purpose in addition to worker health and safety.

---

[4] NSWMA does not challenge the validity of OSHA's final rule.

OSHA has in some cases declared its intent to preempt all state and local requirements on a particular aspect of worker health and safety regulation. *E.g.* Hazard Communication Standard, 29 C.F.R. § 1910.1200(a)(2) (1989). However, we have found no similar statement in the Hazardous Waste Operations final rule, as it now stands.[5] Where the federal statute or regulation contains no explicit preemption clause, "[t]he purpose of Congress is the ultimate touchtone." *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S.Ct. 1185, 1190, 55 L.Ed.2d 443 (1978) (quoting *Retail Clerks Int'l Ass'n. Local 1625 v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 222, 11 L.Ed.2d 179 (1963)). In such cases, we examine the federal scheme to determine whether the state law or regulation would conflict with or frustrate the federal purpose or whether Congress or the federal agency has expressed an intent to occupy the whole field, leaving no room for supplemental state regulation. *Malone*, 435 U.S. at 504, 98 S.Ct. at 1190. Ordinarily, the mere comprehensiveness of federal regulations will not lead to a determination that state laws have been preempted. *Hillsborough County*, 471 U.S. at 717-18, 105 S.Ct. at 2377-78 (observing that agencies typically go into greater detail than Congress and that agencies possess a variety of media – including preambles,

---

[5] OSHA has recently published proposed revisions to the final rule and invited comments. 55 Fed.Reg. 2,776 (proposed Jan. 26, 1990). If accepted, a new section 1910.121(b)(2) would require all states and territories to recognize OSHA-accredited training programs. If this revised rule becomes effective, NSWMA's challenges to the Illinois licensing statutes may become moot, at least insofar as they apply to planned operations (as opposed to emergency response operations).

interpretative statements and responses to comments – in which to express preemptive intent). We note that OSHA has explicitly attempted to avoid broad preemptive effect in promulgating the final rule here. In its "federalism" discussion accompanying the final rule, OSHA explains that it "has used its regulatory preemption of State law to the minimum level necessary to achieve the objectives of the OSH Act and section 126 of SARA." 54 Fed.Reg. at 9315 (Mar. 6, 1989). Since the OSHA final rule denies broad preemptive intent, we proceed to consider whether the Illinois statutes are expressly preempted by section 18 of the OSH Act.

The language of section 18 of the OSH Act does not indicate whether a state law or regulation that purports to serve a dual purpose is preempted. The structure and legislative history of section 18 does, however, demonstrate that Congress hoped to encourage states to participate in worker health and safety regulation by submitting their own state plans. If no OSHA standard exists, a state is permitted by section 18(a) to enact its own – until OSHA steps in the field. However, section 18 unquestionably preempts any state law or regulation whose sole purpose and effect is to establish a standard pertaining to worker health and safety where OSHA has already promulgated such a standard and that state has not obtained the Secretary of Labor's approval for its own plan. The original Senate version of what is now section 18 would have permitted states, without having to obtain approval of a state plan, to impose during a transitional period stricter requirements than those established by OSHA. But that provision was eliminated from the final draft of the bill. *See* H.Rep. No. 91-1765, 91st Cong., 2d

Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5177, 5228, 5238. Despite the deletion of this provision, however, and contrary to NSWMA's argument, section 18 does not evidence a congressional intent to achieve uniformity in worker health and safety regulation: if uniformity of standards were a principal goal of the Act, state plans certainly would not be an ideal mechanism to achieve that purpose. *See* Note, *The Extent of OSHA Preemption of State Hazard Reporting Requirements*, 88 Colum.L.Rev. 630, 642-43 (1988); Note, *Getting Away with Murder: Federal OSHA. Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv.L.Rev. 535, 550-51 (1987). Thus, it seems clear from the language of section 18 that a state may impose stricter worker health and safety standards than those promulgated by OSHA, but only after having obtained OSHA's approval of that state's plan.

While the legislative history regarding the preemptive effect of section 18 is not entirely clear, OSHA has explicitly stated its view that section 18 prohibits a state from asserting jurisdiction over any occupational safety and health issue with respect to which a federal standard already exists, unless the state acts pursuant to a federally approved state plan. 29 C.F.R. § 1901.2 (1989).[6] This

---

[6] 29 C.F.R. section 1901.2 reads, in pertinent part:

> Section 18(a) of the [OSH] Act is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or

(Continued on following page)

interpretation of section 18 is reflected in the OSHA final rule at issue here. OSHA states in the "federalism" discussion accompanying the rule:

> *Those states which have elected to participate under section 18 of the OSH Act* would not be preempted by this final regulation and would be able to address special, local conditions within the framework provided by this performance oriented standard while ensuring that their standards are at least as effective as the Federal standard.

54 Fed. Reg. at 9316 (emphasis added). When a federal statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Although section 18's express preemptive effect appears to be unambiguous, we note that, in any event, OSHA's construction confirms the view that a state must submit a state plan under sections 18(b) and (c) of the OSH Act before it can exercise jurisdiction over a federally regulated occupational safety and health matter.

(Continued from previous page)

> health issue with respect to which a Federal standard has been issued under section 6 of the Act. . . . [The alternative provided by section 18(h) to exclusive Federal jurisdiction] is temporary and may be considered a step towards the more permanent alternative to exclusive Federal jurisdiction provided by sections 18(b) and (c) following submission and approval of a [State] plan. . . .

Further, this interpretation of section 18 has received broad acceptance among federal and state courts. *See Associated Indus. of Mass. v. Snow*, 898 F.2d 274, 278 (1st Cir.1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 55 (2d Cir.1988); *New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587, 592 (3d Cir.1985), *appeal after remand*, 868 F.2d 621 (3d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3246, 106 L.Ed.2d 593 (1989); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 625-26, 640-41 (D.C. Cir.1987), *opinion vacated on other grounds*, 817 F.2d 890 (D.C.Cir.1987); *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 828 (6th Cir.1986), *appeal dismissed and cert. denied*, 484 U.S. 801, 108 S.Ct. 44, 98 L.Ed.2d 9 (1987); *People v. Hegedus*, 432 Mich. 598, 443 N.W.2d 127, 131 (1989); *Thornock v. State*, 229 Mont. 67, 745 P.2d 324, 328 (1987); *Stanislawski v. Industrial Comm'n*, 99 Ill.2d 36, 75 Ill.Dec. 405, 406-07, 457 N.E.2d 399, 400-01 (1983); *United Air Lines v. Occupational Safety and Health Appeals Bd.*, 32 Cal.3d 762, 187 Cal.Rptr. 387, 393-94, 654 P.2d 157, 163-64 (1982); *P & Z Co. v. District of Columbia*, 408 A.2d 1249 (D.C.App.1979); *State v. GTE Valeron Corp.*, 155 A.D.2d 166, 553 N.Y.S.2d 555, 557 (1990); *Lepore v. National Tool and Mfg. Co.*, 224 N.J.Super. 463, 540 A.2d 1296, 1306 (App.Div.1988), *aff'd*, 115 N.J. 226, 557 A.2d 1371 (1989) (per curiam), *cert. denied*, ___ U.S. ___, 110 S.Ct. 366, 107 L.Ed.2d 353 (1989); *Sabrine Consol., Inc. v. State*, 756 S.W.2d 865, 868 (Tex.Crim.App.1988). We have discovered no case contradicting the view that section 18 expressly prohibits states without federally approved state plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard.

The question we face in the present case, of course, is not whether Illinois may promulgate its own health and safety standards for hazardous waste workers in the absence of a federally-approved state plan. Rather, Illinois asserts that its licensing laws serve a *dual* purpose: protection of workers *and* protection of the public. The problem is that many (if not most) of the provisions of the Illinois statutes address both worker health and public health *simultaneously* and through direct regulation of hazardous waste workers. It is impossible in reviewing some of the statutes' provisions to disengage the public health interest from the worker health interest. We must decide, therefore, whether the mere assertion of a concurrent public health purpose can save Illinois's regulation of hazardous waste workers from preemption.[7] We conclude that it cannot.

It would defeat the purpose of section 18 if a state could enact measures stricter than OSHA's and largely accomplished through regulation of worker health and safety simply by asserting a non-occupational purpose for the legislation. Such unauthorized state regulation in this case could result in duplication and unwarranted

---

[7] NSWMA repeatedly stresses OSHA's recognition that, in the case of hazardous waste cleanup sites, the work environment is coterminous with the general environment. We do not understand this statement by OSHA to imply that OSHA intended its final rule to wholly displace any environmental regulation by the states of hazardous waste sites. Moreover, OSHA is not empowered to promulgate environmental regulations that have no discernible bearing on worker health and safety, and we will not assume, based only on NSWMA's allegation, that OSHA has exceeded its statutory delegation of power.

additional costs to workers and employers. Under the Illinois licensing laws, hazardous waste workers whose occupation may take them to Illinois must, among other things, undergo an IEPA or EPA-approved training course for 40 hours (in addition to an OSHA-approved course), pass an IEPA-prescribed written test and, in the case of crane and hoist operators, demonstrate that they have worked with such equipment for at least 4000 hours (40 hours per week for two years). Some of these provisions might well duplicate (or even conflict with) OSHA's training requirements. Section 18 is designed to avoid subjecting workers and employers to duplicative regulation, while allowing states the flexibility to tailor worker health and safety programs to their own needs.

When an OSHA standard exists, and the state has not submitted a section 18 plan, we undertake a two-step inquiry. First, we determine whether the challenged state law or regulation constitutes, in a direct, clear and substantial way, regulation of worker health and safety. A key factor in resolving this question is whether the state law affects employer-employee obligations with respect to health and safety matters in the workplace. Second, we attempt to extricate from the state law or regulation and invalidate those provisions that relate to worker health and safety in a direct, clear and substantial way. In this connection, we must strike any provision with a dual purpose and effect from which the worker health and safety aspect cannot be removed.[8] Any other approach

---

[8] Whether provisions of a state act or regulation are severable is, of course, a question of state law.

would threaten to undermine Congress's intent that states wishing to establish more stringent standards than OSHA's – for whatever reason – submit plans to the Secretary of Labor for approval before going forward with their schemes.

Our test for OSHA preemption of a state law or regulation corresponds closely to the test recently announced by the Supreme Court for application to state laws allegedly impacting upon the federally-reserved field of nuclear health and safety. *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). The Court referred in *English* to its earlier decision in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 211-12, 103 S.Ct. 1713, 1726, 75 L.Ed.2d 752 (1983), in which the Court held that a state law that did not affect radiological health and safety was not preempted by the Atomic Energy Act. The *Pacific Gas* holding corresponds to step one of our test for OSHA preemption. In *English*, the Court also noted that part of the inquiry into the validity of the state law focuses on the *purpose* of the state law, and another part of the inquiry examines the state law's *actual effect* on nuclear safety. 110 S.Ct. at 2278. The *English* test for validity of a state law arguably affecting nuclear health and safety issues examines whether the state law has a *"direct and substantial effect* on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *Id.* (emphasis added). The effect must, therefore, be more than tangential or incidental, as we have stated with respect to state laws challenged under section 18 of the OSH Act.[9]

---

[9] Of course, as in the nuclear health and safety context, *see English*, 110 S.Ct. 2270 (state law action for intentional

(Continued on following page)

To date, three other circuits have grappled with the question whether the assertion of a proper state purpose

---

(Continued from previous page)

infliction of emotional distress was not preempted by Atomic Energy Act); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) (Atomic Energy Act did not preempt application of state law punitive damage rule to state law tort action), a state criminal statute or tort liability rule would not be preempted. Such state laws are not "standards" within the meaning of 29 U.S.C. section 652(8). Moreover, the OSH Act contains a broad savings clause, which provides:

> Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4).

To date, all but one court that have [sic] considered the question of section 18's preemptive effect upon state criminal and tort rules has concluded that section 18 does not preempt such laws. *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987) (California had federally approved state plan, which did not preempt wrongful discharge claim), *cert. denied*, 486 U.S. 1054, 108 S.Ct. 2819, 100 L.Ed.2d 921 (1988); *McElroy v. SOS Int'l, Inc.*, 730 F.Supp. 803 (N.D. Ill.1989) (OSH Act does not preempt state law remedy for retaliatory discharge); *Hegedus*, 443 N.W.2d 127 (OSH Act does not preempt enforcement of state criminal statutes); *People v. Chicago Magnet Wire Corp.*, 126 Ill.2d 356, 128 Ill.Dec. 517, 534 N.E.2d 962 (1989) (OSH Act does not preclude enforcement of state criminal law as to conduct regulated by OSHA standard), *cert. denied sub nom. Asta v. Illinois*, ___ U.S. ___, 110 S.Ct. 52, 107 L.Ed.2d 21 (1989); *P & Z Co. v. District of Columbia*, 408 A.2d 1249 (D.C.App. 1979)

(Continued on following page)

will prevent a state law or regulation pertaining to worker health and safety from being preempted by an OSHA standard. *Associated Indus. of Mass. v. Snow*, 898 F.2d 274 (1st Cir.1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir.1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir.1985) ("*Hughey I*"), *appeal after remand*, 868 F.2d 621 (3d Cir.) ("*Hughey II*"), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3246, 106 L.Ed.2d 593 (1989); *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir.1986), *cert. denied*, 484 U.S. 815, 108 S.Ct. 66, 98 L.Ed.2d 30 (1987). The First and Second Circuits have upheld state regulation of the workplace when such regulation evidences a substantial

---

(Continued from previous page)

(criminal prosecution for employer's failure to report workplace injuries was not preempted by OSHA standard); *People v. Pymm*, 151 A.D.2d 133, 546 N.Y.S.2d 871 (1989) (OSHA standard does not bar criminal prosecutions for violations of state law), *appeal granted*, 75 N.Y.2d 774, 551 N.Y.S.2d 916, 551 N.E.2d 117 (1989); *Lepore*, 540 A.2d 1296 (state law retaliatory discharge action is not preempted by OSHA standard); *State ex rel. Cornellier v. Black*, 144 Wis.2d 745, 425 N.W.2d 21 (App.) (homicide prosecution not barred by OSHA standard), *review denied*, 145 Wis.2d 916, 430 N.W.2d 351 (1988). *See generally* Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv.L.Rev. 535 (1987).

The only case we have located that does interpret section 18 as barring state law-based criminal actions is *Sabine Consolidated, Inc. v. State*, 756 S.W.2d 865 (Tex.Crim.App.1988). That case, however, relied heavily on the rationale of the Illinois appellate decision in *Chicago Magnet*, which has been reversed by the Illinois Supreme Court. Thus, it is questionable whether the Texas courts would continue to follow *Sabine* in light of the increasing body of case law suggesting that *Sabine* is incorrect.

and legitimate state purpose or effect separate from (but in addition to) worker health and safety. The Third Circuit's position is somewhat more complex.

The Third Circuit was the first federal court of appeals to deal with the issue of section 18 preemption of dual purpose state laws. In *Hughey I*, *Hughey II*, and *Knepper*, the court considered the validity of state "right to know" laws in light of OSHA's Hazard Communication standard, 29 C.F.R. § 1910.1200. That standard expressly preempts any state or local law pertaining to the subject of hazard communications to employees.[10] Right to know laws are generally designed to disseminate information to public officials and citizens (and, in some cases, employees) about the types of hazardous materials present in the community. The Third Circuit in *Hughey I* analyzed each aspect of the New Jersey right to know law and declared preempted those provisions which evidenced a "primary purpose" to protect worker health and safety, as opposed to public health and safety.

The New Jersey law required employers, among other things, to complete surveys and compile lists of "environmental hazards" and "workplace hazards." The Third Circuit held that the OSHA standard preempted the state provision to the extent it required a listing of substances deemed solely workplace hazards. Thus, New Jersey could require that employers report substances that present a hazard both to the workplace and to the

---

[10] At the time *Hughey I* and *Knepper* were decided, the preemption applied only to regulation of the manufacturing sector. OSHA has now extended the standard and the preemption to all sectors.

general environment. Moreover, the court upheld New Jersey's labelling requirement for all substances on the environmental hazards list, even though some of those substances were also subject to the OSHA standard. The listing and labelling requirements upheld by the Third Circuit not only had an identifiable purpose and probable effect of dispensing information to workers and non-workers alike about the environmental hazards of certain substances but were also derived from different sources than the workplace hazard listing and labelling provisions that the court struck.[11] Thus, while some substances were subject to both OSHA and New Jersey regulation, the nature of the state's regulation was quite different from the nature of OSHA's. Further, the mere compilation of lists of hazardous substances that might be discharged into the environment does not amount to regulation of the workplace in any meaningful sense: workers would benefit from the environmental hazards list not through their status as workers; rather, they would benefit in the same way and to the same degree as all members of the general public. Consequently, items upheld in *Hughey I* under the "primary purpose" test would also survive preemption under our analysis.[12]

---

[11] The New Jersey environmental hazard list was to be compiled from employer reports, whereas OSHA's regulation provided for identification of substances by the original manufacturer or importer of each substance. *See Hughey I*, 774 F.2d at 594.

[12] In *Hughey II*, a different panel of the Third Circuit reviewed the decision of the district court to which the *Hughey I* panel had remanded the case for additional proceedings. The

(Continued on following page)

In *Knepper*, the Third Circuit applied its "primary purpose" test to Pennsylvania's right-to-know law, which differed in some significant respects from the New Jersey law addressed in *Hughey*. All suppliers were required by the Pennsylvania law to label the hazardous contents of containers shipped to anyone, whether an employer or not. The content of the labelling requirements was compatible with OSHA's in all respects, so the court concluded that the supplier labelling requirement was neither expressly nor implicitly preempted by the OSHA standard. However, the court struck an employer labelling requirement, since it exempted any employer not having any present employees. The court inferred from the exemption that the employer labelling requirement really had as its chief purpose the communication of hazards to employees. The Pennsylvania law also required employers to list *all* hazardous substances that had been present in the workplace during the previous year including all substances appearing on the OSHA list. But the state law required inclusion of substances identified by ten other sources as well and directed that the final list be supplied on request to local police, fire and other emergency response agencies. Further, any member of the public could obtain access to the list from the Pennsylvania Department of Labor and Industry. The Third Circuit upheld this provision because it relied on a

---

(Continued from previous page)

Hughey II panel felt itself bound by the "primary purpose" methodology adopted by the *Hughey I* panel and reaffirmed that panel's decision on the effect of section 18 upon the New Jersey act.

broader base of information than OSHA's list and evidenced a different purpose than workplace safety. The court did, however, strike a provision of the state law requiring every employer to post a list of all hazardous substances found in its workplace and all environmental hazards discharged from its workplace. The court interpreted this section as requiring notification to employees of workplace hazards, which was preempted by the OSHA standard. 801 F.2d at 138. In any event, any worker could obtain the entire list of substances from the state Department of Industry and Labor in her capacity as a citizen.[13]

Our analysis would not change the results in *Knepper* with respect to the labelling and listing of environmental hazards.[14] A container filled with an environmentally

---

[13] It is not clear why the *Knepper* court struck the posting requirement insofar as it applied to employee notification of *environmental* hazards discharged from the workplace. This holding seems to conflict with the court's determination that Pennsylvania could require employers to educate employees about environmental hazards (but not about workplace hazards, since the OSHA standard already provided for that). Under our approach, both the posting and the training requirements would be upheld insofar as they applied to informing employees about *environmental* hazards.

[14] The Third Circuit also upheld the Pennsylvania law's requirement that suppliers of hazardous substances provide all purchasers with Material Safety Data Sheets ("MSDS"). OSHA's standard contained a nearly identical requirement. Like the environmental hazards lists, however, the Pennsylvania MSDS provision applied to more substances than OSHA listed and was directed at those who supply the substances. 801 F.2d at 140-41. The Third Circuit declined to find the

(Continued on following page)

hazardous substance may pass from one hand to another, ultimately finding its way to a landfill or other dump site. The state has a strong interest – one wholly independent of workplace safety regulation – in ensuring that those who handle the container know what is in it so that it is not disposed of carelessly. Likewise, compiling lists of environmentally hazardous substances present in the community and giving fire-fighters and other officials, as well as citizens, access to these lists is not workplace regulation. That some items might appear on both Pennsylvania's and OSHA's lists is not determinative. Nor is it relevant that the source of the items might in some cases be employers. The question is whether the state regulation affects employer-employee obligations more than incidentally with respect to a worker health and safety issue. As with the New Jersey law, any additional benefit reaped by workers from the labelling and listing of environmental hazards would be incidental to the benefit bestowed upon the public at large by the requirements.

(Continued from previous page)

Pennsylvania MSDS provision preempted as it applied to *suppliers*, but the court did strike the state law's requirements that employers disclose to employees the contents of each MSDS. The court made no distinction between those MSDS's for environmental hazards and those for solely workplace hazards. Rather, the court focused on the status of the parties giving and receiving the communications, so as to avoid impinging upon OSHA's province. The law was struck only to the extent it required a hazard communication between employers and their employees. Again, though, we think the state's law could have been upheld as it applied to communication of *environmental* hazards to workers.

The Third Circuit also examined in *Knepper* the Pennsylvania law's requirements with regard to employer educational programs and state outreach programs. The Third Circuit determined that Pennsylvania could require employers to conduct education programs for their employees concerning *environmental* hazards (but not workplace hazards). 801 F.2d at 142. Similarly, the court upheld a provision directing the Department of Industry and Labor to develop outreach programs to inform the public *and employees* about environmentally hazardous substances, but the court struck the provision to the extent it applied to communication of information about *workplace* hazards to employees. *Id.* In analyzing these two provisions, the Third Circuit was able to extricate the proper state interest in environmental regulation from regulation of worker health and safety. Thus, these provisions, as edited by the Third Circuit, would also survive under our approach.

The difficulty we experience with the Third Circuit's "primary purpose" test – although we would reach virtually the same results applying our own analysis as those reached by the Third Circuit in *Hughey* and *Knepper* – is epitomized by Illinois's 4000-hour operating experience requirement. In neither *Hughey* nor *Knepper* did the Third Circuit confront a true "dual purpose" problem: the labelling and listing requirements were not truly workplace regulations, although they did have some effect on worker health as one aspect of general public health. The offending requirements of the other provisions addressed by the Third Circuit which did directly, clearly and substantially regulate worker health and safety were extricable from the requirements designed to fulfill a proper

state goal. But Illinois's 4000-hour rule directly, clearly and substantially implicates worker health and safety as well as public health and safety, and it is impossible to modify the provision so as to delete matter serving the impermissible worker health and safety goal without also eliminating matter serving the permissible public health and safety goal.[15] Under the Third Circuit's test, the 4000-hour requirement might survive, since it is directed both to worker health and safety and to "broader" concerns. We think such a result would clearly undermine the purpose of section 18.[16]

---

[15] Evidence submitted to the district court on the public health interest behind the 4000-hour rule was inconclusive: no expert was able to identify the point at which the "learning curve" begins to plateau, indicating that additional operating experience will yield only marginal or negligible increases in worker health and safety or public health and safety. Moreover, Illinois has not set out to explain why a worker whose experience suggests she is sufficiently competent to satisfy worker health and safety concerns would not also be sufficiently competent to satisfy public health and safety concerns.

[16] A New Jersey district court has interpreted the Third Circuit's *Hughey* and *Knepper* opinions in a manner that makes those decisions wholly compatible with our approach in the present case. Analyzing a preemption challenge to New Jersey's Asbestos Control and Licensing Act, Judge Debevoise – the same district judge who presided over the *Hughey* litigation – recognized the difficulty of applying the primary purpose test to a true dual purpose state regulation. *New Jersey Chamber of Commerce v. New Jersey*, 653 F.Supp. 1453, 1465 (D.N.J.1987). In this context, Judge Debevoise concluded that "*Hughey [I]* and *Knepper* must be read to hold that unless the state provisions are directed specifically towards non-occupational safety concerns, they are expressly preempted, since OSHA has chosen to occupy this field. . . . The allegation of an additional

(Continued on following page)

Nor do the Second and First Circuit's recent decisions give us satisfactory assistance in resolving this problem. The Second Circuit disavowed the "primary purpose" test, since it appeared too difficult in many cases to determine what is a "primary" purpose and what a secondary or tertiary purpose. Instead, the Second Circuit reviewed the challenged legislation – a New York City ordinance regulating training in asbestos handling – for a "legitimate and substantial purpose apart from the promotion of occupational health and safety." *Environmental Encapsulating*, 855 F.2d at 57. Applying this test, the Second Circuit excised two provisions of the ordinance that evidenced only a worker health and safety purpose. But the court left intact the remainder of the ordinance, much of which covered items already addressed in OSHA's standard on the same topic (e.g., personal hygiene, personal protective equipment, preparation of the work area). The city's training program was more rigorous than OSHA's, and, unlike OSHA, the city required testing and certification of all asbestos handlers. Reviewing a preemption challenge to Massachusetts's asbestos handling training and certification regulations, the First Circuit rejected both the Second Circuit and the Third Circuit approaches because those courts' tests require inquiry into legislative history – a highly speculative business. Instead, the First Circuit examined the *effect* of the challenged statute. Because the court found that the state's training and certification requirements had the

---

(Continued from previous page)

purpose for [the state's] scheme does not render it immune from preemption." *Id.* at 1466.

effect of protecting public health, it concluded that the OSHA standard did not preempt the state act.[17]

The district court in this case followed the Second Circuit's approach. But in our view, both the Second Circuit's and the First Circuit's analyses contain serious flaws. As the First Circuit persuasively observed, the Second Circuit – like the Third – relies too heavily on an assessment of the legislature's subjective purpose. Merely asserting a desire to protect public health and safety cannot save a provision that infringes upon OSHA's province. At the same time, the likelihood that a particular provision will have a beneficial *effect* upon public health and safety is on no better ground than a provision supported by a proper state *purpose*. Section 18 is clear: where OSHA has properly established a standard, a state may not create a standard of its own on the same topic unless the state acts pursuant to a plan approved by the Secretary of Labor. Illinois, if it wishes to enact laws or to

---

[17] It is not entirely clear whether the First Circuit based its decision solely on the question whether the state act had a public health effect: the court observed that the Massachusetts training curriculum was modelled after EPA's Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. §§ 2641 *et seq.*, which requires states to implement such training and certification programs in conjunction with EPA. *Id.* at § 2646. The court noted that EPA's program was directed at the protection of public health and, as a section of the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, was expressly defined *not* to be an occupational health and safety measure, *id.* at § 2608(c). *See Associated Industries*, 898 F.2d at 280 & n. 6. Thus, the remainder of the First Circuit's opinion in *Associated Industries* may be dicta.

impose regulations that it believes would more adequately account for the state's environmental and public health concerns, may submit to OSHA a state plan pursuant to sections 18(b) and (c) and thereby displace the application of OSHA's final rule to workers within Illinois. But the state cannot regulate worker health and safety under the guise of environmental regulation.

As we have already intimated, we disagree with the district court's conclusion that Illinois's 4000-hour operating experience requirement may survive preemption simply because the rule may also enhance public health and safety. There is clearly no way to separate the worker health and safety aspect of the requirement from the public health and safety aspect. Thus, the entire requirement must fall.

Many of the Illinois statutes' provisions lack concrete form at this time because the implementing regulations have not yet reached final form. For example, the Illinois statute does not specify the contents of the required training program or the written test. We therefore vacate the judgment and remand to the district court for application to the Illinois licensing statutes of the principles we have described.[18] Because we base our decision on section 18,

---

[18] If on remand the district court determines that some but not all of the licensing statutes' provisions are preempted by the OSHA final rule, the district court will, of course, be obliged to determine whether Illinois law permits the severance of the offending provisions without requiring that the statutes be stricken in their entirety. In this connection, we note that Illinois does have a general severability provision, which instructs that a holding that the invalidation of one provision

(Continued on following page)

we do not address NSWMA's alternative contentions that the Illinois acts actually conflict with the OSHA final rule and that OSHA has occupied the field.

III. NSWMA's Commerce Clause Challenge

Since we have determined that the 4000-hour rule is preempted, we do not address NSWMA's appeal from the district court's dismissal of NSWMA's commerce clause claim for lack of ripeness. Similarly, since the district court struck the "within Illinois" requirement for training and testing on preemption grounds, and since the Illinois defendants do not appeal that decision, we leave the district court's judgment on that issue undisturbed.

We are, however, concerned about the potential burden on interstate commerce suggested by the exemption of certain classes of employees from the requirements of the Illinois statutes. It is not clear why Illinois would choose to exempt agricultural, mining and railroad workers from the statutes' training and testing provisions; it is even less clear why the employees of a manufacturing facility that is undergoing an environmental cleanup pursuant to state or federal law should be exempt from satisfying Illinois's requirements, so long as they have completed OSHA's required training. In this connection, we note that such exemptions may suggest an

---

(Continued from previous page)

of an act "does not affect other provisions or applications of the [a]ct which can be given effect without the invalid application or provision. . . ." Ill.Rev.Stat. ch. 1, ¶1032.

intent by a state to discriminate against interstate commerce in favor of local interests. In *Raymond Motor Transport, Inc. v. Rice*, 434 U.S. 429, 446-47, 98 S.Ct. 787, 796-97, 54 L.Ed.2d 664 (1978), the Supreme Court observed that statutory exceptions which on their face discriminate in favor of local industry or which, although facially neutral, primarily benefit local industry "weaken the presumption in favor of the validity of the general limit [prescribed by the statute], because they undermine the assumption that the State's own political processes will act as a check on local regulations that unduly burden interstate commerce." On remand, therefore – assuming that some portions of the Illinois statutes survive preemption analysis – the district court should inquire into the purpose and likely effect of these exemptions and determine whether they unduly burden interstate commerce.

IV. Conclusion

The district court's judgment is Vacated and Remanded for further proceedings consistent with this opinion.

EASTERBROOK, Circuit Judge,
dubitante.

The court's opinion establishes a simple approach to preemption under § 18 of OSHA. Although phrased as two steps, it boils down to this: Any rule that affects workers' health and safety in a direct, clear, and substantial way is preempted, even if that rule serves a purpose other than, or in addition to, workers' health and safety. This is superior to the standards created by the second

and third circuits because it dispenses with questions about legislative intent (the "intent" of a collective body is a construct, not a fact) and superior to the standard of the first circuit, which does not inquire into intent, because it avoids weighing the importance or substantiality of effects, a legislative task.

Still, I am not so sure as my colleagues that § 18 preempts state rules. The court says that § 18 "unquestionably preempts" state law (918 F.2d at 677), is "clear" (*id.* at 677, 684), is "express" and "unambiguous" (*id.* at 678), and "expressly prohibits" states from regulating without submitting their plans to the federal government (*id.* at 678). All these "clearly"s demonstrate more certitude than § 18 warrants.

Section 18(a) says that "[n]othing in this chapter shall prevent any State . . . from asserting jurisdiction over any occupational safety or health issue with respect to which no [federal] standard is in effect". This does *not* continue by saying that if there is a federal standard, then state law is preempted. Section 18(b) continues:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

This sounds like an option for the states, not like a constraint. A state may take over the subject – that is, oust OSHA's rule. Before doing this, however, it must secure federal approval. Section 18(b) does not say that if

a state wants to *add* to the body of rules, while leaving federal standards (and enforcement) unaffected, it needs federal permission.

The court treats § 18(b) as if it read:

> *No* State *may*, at any time, . . . assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title *unless it has submitted* a State plan for the development of such standards and their enforcement.

The strongest support for this reading, although one the court does not give directly, is a negative implication. From the listing in § 18(a) and 18(b) of two ways the state may apply its law, coupled with the preservation in § 4(b)(4), 29 U.S.C. § 653(b)(4), of workers' compensation laws, the court infers that there are no others. It is an application of the maxim *expressio unius est exclusio alterius*. Although this maxim is misleading more often than it is helpful – for it does not say *why* a court ought infer that every list is exclusive – the idea has some power here. Federal regulations of health and safety are supposed to do enough to protect those interests. If states then do more, they are doing too much: they are achieving increasingly small benefits at increasingly high cost, into the range of negative returns. If states are not doing more, but are simply doing something different, then there is a substantial risk of the two sovereigns getting in each other's way, of too many cooks spoiling the broth. So either the "more" or the "different" variation seems to imply preemption. Congress recognized this possibility

and sought to avert preemption, but limited its salvation to three classes of cases. It follows that Illinois is trying to use a route closed to the states.

Attractive as this conclusion is, the argument is overstated. It paradoxically treats preservation of state law as interdiction, for many federal laws lack anti-preemption clauses yet state laws are allowed to coexist with federal regulation. To treat anti-preemption clauses as if they implicitly preempt all they do not save may invert the proper result.

Federal regulatory systems do not invariably (or even frequently) imply that states lack authority to regulate on their own. *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (nuclear safety); *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) (antitrust); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) (medical safety); *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 502-05 (7th Cir. 1989) (tender offers); *Air Line Pilots Ass'n v. UAL Corp.*, 874 F.2d 439, 446-47 (7th Cir. 1989) (interaction of labor and corporate law). In each case one could have said that the federal rules established the "right" amount of regulation, and that to do more or to do it differently necessarily contradicted the federal judgment. In each case the court rejected the premise of the argument – that the limited extent of the existing federal rule necessarily implies that the federal government has determined that something more, or something different, is a bad thing. To the contrary, federal courts rarely infer preemption of "state law in areas traditionally regulated by the States", *ARC America Corp.*, 109 S.Ct. at 1665, a

category that includes occupational licensing. States have been regulating entry into occupations since colonial days.

The two arguments the court does give (beside the drumbeat that § 18 is "clear") are weaker than the argument from negative implication. One is that every other court that has considered this question has understood § 18 to preempt state law. This is not a reason why § 18 *does* preempt state law. A desire to preserve harmony among the inferior federal courts means that we need a good reason to act differently; yet we are rejecting every other court's *approach* to preemption under OSHA and creating a novel test, so uniformity is not dispositive today. The other, and final, reason is that the conference committee eliminated a provision that would have permitted states to create rules stricter than the Department of Labor's (918 F.2d at 677). The details of this episode show that it will not bear the weight my colleagues evidently assign to it.

What is now § 18(h) of OSHA is a transition provision, allowing states to use their own rules without hindrance during the first two years of OSHA's existence. The Senate's version of the transition rule, then § 17(h), read this way:

> Pending approval of a plan submitted by a State under subsection (b) of this section, the Secretary may enter into an agreement with such State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State which are not in conflict with Federal occupational health and safety standards promulgated under this Act until final action is

> taken by the Secretary with respect to the plan submitted by the State, or two years from the date of enactment of this Act, whichever is earlier. Except as otherwise provided in this section, any State occupational health and safety standard which provides for more stringent health and safety regulations than do the Federal standards promulgated under this Act shall not thereby be considered to be in conflict with such Federal standards.

116 Cong.Rec. 37637 (Nov. 17, 1970). The first sentence limited state plans to those "not in conflict with" federal rules; the second sentence said that more stringent rules do not conflict. The upshot was that states could use their own standards pending approval by the Secretary only if they were "more stringent" than the federal rules.

As it came out of the conference committee, § 18(h) read so:

> The Secretary may enter into an agreement with a State under which the State will be permitted to continue to enforce one or more occupational health and safety standards in effect in such State until final action is taken by the Secretary with respect to a plan submitted by a State under subsection (b) of this section, or two years from December 29, 1970, whichever is earlier.

29 U.S.C. § 667(h). This means that the state may use its own rules during the transitional period, even if they are not as stringent as the federal rules.

Restored to its context, however, the deletion of the Senate's language does not bear on our problem. The Senate wanted to limit the automatic application of state rules during the transition period to those more stringent

than the federal rules; Congress as a whole allowed even less stringent state rules to govern during the two-year transition, provided the Secretary approved. Section 18(c), dealing with final approval of plans, reinforces this. Final state plans may differ from federal ones, omitting portions of the federal rules, so long as they are on balance as "effective", § 18(c)(2). Thus the deletion of the Senate language on transitions does not imply that state rules *adding* to permanent federal rules are preempted.

What about the other side? What may be said for the possibility that Illinois is free to add to federal requirements?

* Preventing state augmentation of federal rules is not logically essential to the success of the federal project. Conflicting state rules that hinder accomplishment of the federal objectives are preempted. We need not condemn all in order to avert conflict.

* Overlapping state and federal jurisdiction is the norm, so silent or ambiguous laws ordinarily are understood to allow state regulation – especially when the state deploys "traditional" regulation, such as occupational licensing.

* Overlapping state and federal regulation of safety in the workplace, in particular, is the norm. State workers' compensation laws require employers to pay money on account of accidents caused by hazards covered by OSHA. State structural work acts regulate the construction of scaffolds in detail, and prescribe remedies, although OSHA covers much of the same ground. The "general duty clause" of the Secretary's regulations says, in essence, "create no needless hazards." If this regulation and the many other consensus

standards that the Secretary promulgated preempt state law under § 18(b), many traditional areas of state regulation vanish.

* Legislative history treats § 18(b) as a device for states to replace federal rules, not as a ban on state rules supplementing federal ones. For example, the Senate report describes § 18(b) as a provision that "whenever a State wishes to assume responsibility for developing or enforcing standards in an area where standards have been promulgated under this act, the State may do so under a State plan approved by the Secretary of Labor. . . . [I]ndustries or hazards not covered by the plan will continue to be under Federal jurisdiction." S.Rep.No. 91-1282, 91st Cong., 2d Sess. 18 (1970). Nothing in any of the reports describes § 18 as a provision preempting state law.

My colleagues reply to the third of these by concluding that rules established by tort and criminal law cannot be "standards" for purposes of OSHA, pointing to § 4(b)(4) and collecting the many cases holding that OSHA does not preempt state tort or criminal law, 918 F.2d at 679-80 & n. 9. The reply would be more comforting had not other federal courts concluded that rules of tort law *are* "standards" for purposes of federal auto safety law, so that states may not conclude that cars lacking passive restraints are tortiously designed, despite a savings clause, 15 U.S.C. § 1397(c), more powerful than § 4(b)(4) of OSHA. *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3d Cir. 1990). If tort rules are auto safety "standards" –

on the theory that damages may be as potent as administrative rules in inducing firms to alter their behavior – why can't tort rules be employment safety "standards"? If the airbag cases are right, the cases collected in the court's footnote 9 are problematic.

I cannot join an opinion that shortstops the inquiry by calling § 18 "clear" or by relying on the deletion of the Senate's proposed transition rule. I refrain from dissenting only because I find the arguments closely balanced. The collective judgment of many other courts finding a negative implication in the combination of § 4(b)(4) and § 18 leads me to hesitate. On one issue, though, I am persuaded: If § 18 has a negative implication, then preemption depends on the effects of the state law rather than the intent or primary purpose of the state lawmakers.

Application of this test is not so straightforward as the court implies, however. The court treats the 4,000-hour rule as one that "constitutes, in a direct, clear and substantial way regulation of worker health and safety." 918 F.2d at 679. Yet the plaintiff trade association insists that the law does *not* promote occupational safety, that it is nothing but interest-group legislation designed to reduce the number of licensed heavy equipment operators and thus drive up their wages. See Jeffrey M. Perloff, *The Impact of Licensing Laws on Wage Changes in the Construction Industry*, 23 J.L. & Econ. 409 (1980). See also Ann P. Bartel & Lacy Glen Thomas, *Predation through Regulation: The Wage and Profit Effects of the Occupational Safety and Health Administration and the Environmental Protection Agency*, 30 J.L. & Econ. 239 (1987); Morris M. Kleiner, Robert S. Gay & Karen Green, *Barriers to Labor Migration:*

The Case of Occupational Licensing, 21 Industrial Relations 383 (1982); Alex Maurizi, *The Impact of Regulation on Quality: The Case of California Contractors*, in *Occupational Licensure and Regulation* 26 (Simon Rottenberg ed. 1980).

Although expertise increases with experience, the learning curve flattens out sooner or later. Does that time come sooner (400 hours?) or later (4,000)? Nothing in the record or the legislative debates so much as hints that experience past 400 or even 40 hours has a measurable effect on safety. Suppose Illinois had enacted this law: "Heavy equipment operators dealing with hazardous wastes shall be paid $5.00 more per hour than the market wage of operators of identical equipment in other lines of business." This statute could not be thought preempted by OSHA, yet for all we know it is identical in effect to the statutes Illinois enacted.

Illinois does not defend its statutes by insisting that they are unrelated to industrial safety. Preambles trumpet that the laws "promote job safety", Ill.Rev.Stat. ch. 111 ¶¶7702, 7802. Very well. If Illinois chooses to dress up what looks to be an interest-group deal in public-interest clothing, it cannot rely on judicial x-ray vision. The preambles to the state laws *are* "clear", quite unlike § 18 of OSHA. Taking Illinois at its word leads to the conclusion that the laws are preempted, if as my colleagues believe § 18 preempts state laws that regulate health and safety on the job.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Name of Assigned Judge or Magistrate
JAMES B. ZAGEL
Sitting Judge/Mag. If Other Than Assigned Judge/Mag.
Case Number 88 C 10732 Date 30 Aug 89
Case Title NATIONAL SOLID WASTES MANAGEMENT V. KILLIAN, et al

* * *

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

(1) ___ Judgment is entered as follows:

(2) XX [Other docket entry:]

Plaintiff's motion to clarify and for amendment of conclusions of law is granted.

* * *

Docketing dpty. initials
date mid. notices
mailing dpty. initials

ORDER

August 30, 1989 88 C 10732 Judge Zagel

The Memorandum Opinion and Order of 14 Aug 89 is amended to strike the "within Illinois" requirement from Ill. Rev. Stat. ch. 111, sec. 7706(c), the "apprentice training" provision. The remaining aspects of the plaintiff's motion for clarification, as well as its motion for new trial, are denied, except that we hold expressly that the plaintiff's challenge to the "written testing" requirement is not ripe at this time because it is not clear how the State will implement this requirement.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Plaintiff

v.

BERNARD KILLIAN, et al.,

Defendants

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88 C 10732
Judge Zagel

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_x_ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, the words "within Illinois" are stricken from sections 7705(d) and 7805(d) of the Illinois Acts. Enter Memorandum Opinion and Order.

August 16, 1989
Date

H. STUART CUNNINGHAM
Clerk

/s/ Donald Walker
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION, an Illinois not-for-profit corporation,

Plaintiff,

v.

BERNARD KILLIAN, Director of the Environmental Protection Agency, an Illinois agency, in his representative capacity; and NEIL F. HARTIGAN, Attorney General of the State of Illinois, in his representative capacity.

Defendants.

NO. 88 C 10732

HONORABLE JAMES B. ZAGEL

MEMORANDUM OPINION AND ORDER

Findings of Fact

1. National Solid Wastes Management Association (National) is a national trade organization whose members are employers doing business in the hazardous waste remediation industry.

2. National is a proper party representative of its members.

3. National's members operate under and are subject to the Occupational Safety and Health Act (OSH Act), the Occupational Safety and Health Administration (OSHA), as well as other federal statutes such as the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and the Superfund

Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. sec. 9601 *et seq.*

4. Bernard Killian is the Director of the Illinois Environmental Protection Agency (IEPA).

5. The IEPA is responsible for implementing and enforcing the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act (Ill. Rev. Stat. ch. 111, sec. 7701 *et seq.*) and the Hazardous Waste Laborers Licensing Act (Ill. Rev. Stat. ch. 111, sec. 7801 *et seq.*).

6. The employees of National's members perform hazardous waste remediation work, including emergency response and planned remediation work.

7. Among these employees are heavy equipment operators and general laborers.

8. Ordinarily, these employees are permanent, rather than temporary (or job specific).

9. These employees are field-experienced, trained and qualified to engage in hazardous waste remediation work in accordance with interim OSHA Regulation, 29 C.F.R. Part 1910.120.

10. National's members perform hazardous waste remediation work on a national basis, and their employees commonly work in more than one state over a given period of time.

11. National's members are required by OSHA regulation to train, qualify, and certify their hazardous waste remediation workers. *See* 29 C.F.R. Part 1910.120.

12. Part 1910.120 regulates training, medical surveillance, job site analysis, field experience, specific

decontamination procedures, drum handling, annual refresher courses, as well as other specific procedures and competency standards for hazardous waste remediation workers, including equipment operators and laborers.

13. OSHA periodically has audited and approved the OSHA mandated training program of some of National's members to ensure they are complying with the regulation.

14. The Illinois Acts are intended "to promote job safety and to protect life, limb and property." *See* Ill. Rev. Stat. ch. 111, secs. 7702, 7802.

15. The IEPA did not participate in the drafting or passage of either of the Illinois Acts, but Local 150 of the Operating Engineers' union did.

16. The Illinois Acts regulate the same matter (and therefore the same employees) as Part 1910.120.

17. For example, the Illinois Acts require that hazardous waste remediation workers receive the same initial training mandated by OSHA (40 hours), but they also require that such training be conducted *in* Illinois. *See* secs. 7705(d), 7805(d).

18. In addition, to qualify for a license under the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, a person must submit "a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours." Sec. 7705(c).

19. Killian introduced no evidence at trial which would arguably tend to show that the training-within-Illinois or 4,000-hour requirement would reduce the risk

of danger to the public or employees or the environment. Indeed, one of National's experts, Dr. Fred Halvorsen, testified that if implemented and enforced, there is "some possibility" the Illinois Acts would *increase* such risk.

20. One of the ways in which the Illinois Acts could result in increased risk is that they would diminish the pool of workers available to clean up hazardous waste sites; and this diminution could be critical in an emergency response situation.

21. Thus, under the Illinois Acts an employer could not send into Illinois to perform hazardous waste "remediation" services any employees who had not received 40 hours of training within Illinois or (to perform heavy equipment operations) any employee who could not present certification that he had at least 4,000 hours of experience operating equipment used in hazardous waste handling.

22. And this could frustrate an employer's attempt to respond to environmental emergencies. For example, some of National's members have contracted with the United States EPA to perform emergency response work (aptly called Emergency Response Contracts); and meeting these obligations could be impaired by the Illinois Acts.

23. In addition, the Illinois Acts carry the potential to disrupt the operation of the federally-endorsed "Buddy System."

24. Part 1910.120(a)(3) defines the "Buddy System" as "a system of organizing employees into work groups in such a manner that each employee of the work group is

designated to be observed by at least one other employee in the work group." By making employees responsible for one another, the Buddy System fosters "rapid assistance to employees in the event of an emergency."

25. The Illinois Acts, however, may well throw a monkey wrench into the Buddy System because they carry the potential of impairing employers from developing effective work groups. Suppose an employer put together a work group of ten employees who were based in Indiana, but only four of whom were qualified to be licensed under the Illinois Acts; it is conceivable (though by no means certain) that in responding to an emergency in Illinois, the Buddy System for those four licensed employees would be kaput.

Conclusions of Law

1. We have jurisdiction over this lawsuit pursuant to 28 U.S.C. secs. 1331 and 2201.

2. National's first claim is that the Illinois Acts are preempted by 29 C.F.R. Part 1910.120.

3. Preemption comes in two stripes: express and implied. Express preemption exists where Congress articulates a specific intent to displace an entire field of state regulation.

4. Implied preemption is more elusive, however. State law is impliedly preempted when Congress legislates comprehensively to occupy an entire field of regulation, leaving no room for supplemental state regulation, *Northwest Central Pipeline v. State Corp. Comm'n of Kansas*, 109 S. Ct. 1262, 1273 (1989); or when state law actually

conflicts with federal law, either because it is impossible to comply with both bodies of law, or because state law obstructs the accomplishment of congressional objectives, *id.; Hines v. Davidowitz*, 312 U.S. 52 (1941).

5. In considering whether state regulation is impliedly preempted, however, there is a "presumption" that state or local regulation of matters related to health and safety is not [preempted]." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). Killian correctly points out that the statutes being challenged here fall within this domain; therefore, to prevail, National must show that preemption of this type of state regulation "was the clear and manifest purpose of Congress." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

6. We address first express preemption. Section 18(b) of the OSH Act provides that states wishing to regulate an occupational safety or health issue covered by a federal regulation must first submit a plan to federal authorities for approval. 29 U.S.C. sec. 667(b).

7. Preemption under Sec. 18(b) focuses on the scope of the federal regulations, rather than on the OSH Act. *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 54 (2d Cir. 1988). (Federal regulations as well as federal statutes can preempt state law. *Hillsborough*, 471 U.S. at 713.)

8. The issue thus revolves on the scope of the relevant OSHA regulations, Part 1910.120. National argues, and Killian concedes, that the Illinois Acts regulate matters expressly covered by Part 1910.120. Specifically, Part 1910.120 sets out training requirements for a large class of employees, including heavy equipment operators and

general laborers – the employees encompassed by the Illinois Acts. Nonetheless, Killian contends the Illinois Acts are not preempted.

9. In so contending, Killian relies heavily on the principle that the preemptive reach of federal law extends only as far as its purpose. See, e.g., *Huron Cement Co. v. Detroit*, 362 U.S. 440, 444-45 (1960).

10. The purpose of Part 1910.120, according to Killian, is to promote occupational safety and health. But the Illinois Acts have a dual purpose: to promote job safety *and* public safety (including environmental protection).

11. National's response to this is that since both bodies of law have a common purpose, it is sufficient to justify preemption. Killian disagrees, citing *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 57 (2d Cir. 1988), in which the Second Circuit held that the precise federal regulations at issue here preempted local regulations, enacted for a dual purpose, only to the extent that the local regulations lacked a "legitimate and substantial purpose apart" from promoting occupational health and safety.

12. Other courts faced with the issue of the preemptive scope of sec. 18(b) (in cases involving state laws enacted for multiple purposes) have held that it preempts such state law which has as its "primary purpose" enhancing job safety in an area covered by federal regulation. See *Manufacturers' Ass'n v. Knepper*, 801 F.2d 130, 137 (3d Cir. 1986), *cert. denied*, 108 S. Ct. 66 (1987).

13. Every Court of Appeals which has addressed the issue, therefore, has rejected the argument that National urges on us (namely, that a common purpose to state and federal regulation is sufficient to warrant preemption even where the state regulation serves another purpose). While none of these decisions is binding on us, we extend considerable deference to them, cf. *Levit v. Ingersoll Rand Financial Corp.*, 874 F.2d 1186, 1193-94 (7th Cir. 1989); as such, it would require compelling reasons to choose the trail National blazes, but National offers no such reasons. Therefore we reject this argument.

14. But two questions remain. First, which yardstick of preemption should be applied to state laws enacted for more than one purpose?, and second, do the Illinois Acts survive the test?

15. Regarding the first question, we find the Second Circuit's test, that state regulation is not preempted to the extent there exists a legitimate and substantial purpose apart from promoting job safety, a workable analytic tool, and therefore preferable to the "primary purpose" adopted by the Third Circuit. See also *Michigan v. Hegedus*, No. 83601 (Mich. Sup. Ct. July 3, 1989), which uses the Second Circuit's approach. It is workable because the legitimacy of a law's purpose can be measured according to objective criteria. For example, courts can consult objective principles of morality, which form the seeds of much of what is now called the police powers, and history, cf. *FDIC v. Bank One, Waukesha*, No. 88-2511, slip op. at 5-6 (7th Cir. Aug. 1, 1989), in determining whether a given purpose for state regulation is legitimate. Similarly, history and constitutional divisions of power (federalism) may prove useful in deciding

whether a state's interest in regulating certain conduct is "substantial."

16. The same cannot be said of the "primary purpose" test. The major shortcoming with this test is not theoretical, but practical. To determine the "primary purpose" for which legislation was enacted one must not only explore legislative intent (itself a risky business, see *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989); *In re Virtual Network Services Corp.*, 98 B.R. 343 (N.D. Ill. 1989)), one must also make the difficult (if not impossible) judgment regarding which purpose the legislators found (or believed) more important. This inquiry thus focuses on the *actual* intent of individual legislators as they cast their votes. The weaknesses inherent in this type of inquiry are well known and the criticisms of it are persuasive. Most importantly for our purposes, there is no *principled* manner for executing this task. Granted, this may not be cause for concern in the legislative arena, where outcomes frequently are determined by will, but it is reason for pause in the judicial realm, where outcomes should be the product of *reasoned* judgments. See *The Federalist* No. 78 (A. Hamilton) (Modern Library ed.); H. Arkes, *First Things* 420 (1986). Cf. *Szabo Food Service. Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988). Given the choice between tests which examine objective and subjective criteria, we choose – without pause – the former; for only inquiries which can be resolved by reference to objective criteria can provide the foundation for rules which may be applied equally, and in a manner that is not completely ad hoc.

17. In applying the Second Circuit's "independent basis" test, we think it clear that the burden of demonstrating that state regulation has a legitimate and substantial purpose apart from the purpose fostered by federal law rests on the state. If anyone can marshal the evidence necessary to establish the legitimacy and substantiality of state legislation, it is the State.

18. The purpose of state legislation is *legitimate* if it regulates matters not committed to the exclusive control of the federal government by virtue of the Constitution such as national defense (we recognize of course that this aspect of the test is not particularly stringent, but for that it is no less valid); it is *substantial* if (a) it governs matters that, in light of the federal interest at stake, arguably are not insignificant, and (b) it arguably advances the purpose sought to be achieved.

19. Applying the test to the portions of the Illinois Acts challenged here, the training-within-Illinois and 4,000-hours requirements, we hold that the former must fall, but the latter survives.

20. In our view there is no question that the public safety and environmental protection purposes of the Illinois Acts are legitimate: this area of regulation has not been committed to the exclusive stewardship of the federal government. Indeed, legislation directed toward public safety and environmental protection falls squarely within even the most stingy view of the States' historic police powers, *Huron Cement Co.*, 362 U.S. at 442, and therefore comprises an area in which the States have abundant power to act.

21. Nor can it be said that Illinois' interests in these ends are insignificant in light of the federal government's interest in occupational safety and health. Workers' lives and physical well-being are important. But so are those of the citizenry; and, as human life depends on natural resources to sustain it, weighty too is Illinois' interest in the environment.

22. The only issue left, then, is whether Killian has offered evidence sufficient to demonstrate that the challenged requirements of the Illinois Acts arguably further Illinois' legitimate interests in public safety and environmental protection.

23. Regarding the training-within-Illinois requirement, Killian has not offered even a scintilla (of a scintilla) of evidence to show that compliance with this directive will forward either public safety or environmental protection.

24. Geofrey Langley (National's witness) testified that this requirement would actually place the public and environment in greater peril because it would have the effect of diminishing the number of qualified employees available to perform hazardous waste remediation work. It would have this effect because many (or at least some) out-of-state workers will be unable to travel to Illinois to undertake the 40-hour training session (which, by the way, is not cheap), thereby disqualifying them.

25. The within-Illinois requirement would be defensible if Illinois' topography were such that training in Illinois bore a plausible relationship to performing services in Illinois. In fact, however, the only testimony on this score came from one of Killian's witnesses, Gene

Buss, who, on cross-examination, conceded that no two hazardous waste sites are alike, and from one of National's witnesses, Dr. Halvorsen who testified that there is "no reason to require training in any specific [geographic] area." Training is site specific. Thus, training at one site in Illinois likely would not help one on a job at another site in Illinois. Therefore, we can only conclude that the training-within-Illinois requirement is not rationally related to the Illinois Acts, proposed ends of public safety or environmental protection and thus does not arguably serve to promote those ends. This requirement, accordingly, is insubstantial, and, since Illinois has not filed a plan with OSHA pursuant to sec. 18 of the OSH Act, it is expressly preempted.

26. We do not believe, however, that the same can be said of the 4,000-hour requirement. It is a truism that expertise follows experience. And 4,000 hours of experience represents a sizable step on the road to expertise (it equals 2 full years – 50 weeks x 40 hours per week = 2,000 hours per year). Certainly there is a rational basis to believe that one who has labored on equipment for two years is proficient on that equipment. This conclusion is valid despite the fact that Killian offered no support for it. True, Gene Buss, an instructor of training classes, opined that the 4,000-hour requirement signifies that a worker possesses "a good knowledge or a good understanding" of the equipment which he uses. But Mr. Buss's opinion conspicuously lacks reasoned justification, apart from the implicit common sense rationale we have identified. And "[a]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process."

Mid-State Fertilizer Co. v. Exchange National Bank, 877 F.2d 1333, ___ (7th Cir. 1989).

27. Mr Buss's feeble testimony aside, we believe one may conclude reasonably that a worker who has 4,000 hours of experience on certain equipment is proficient on that equipment. This proficiency, in turn, justifies the further conclusion that workers who satisfy the 4,000-hour requirement (as to *how* they will satisfy it, see below) will be better skilled than those who do not; and better skilled means fewer accidents, which equals less risk to public safety and the environment. On this record, accordingly, we are persuaded that the 4,000-hour requirement arguably advances the State's interests in public safety and environmental protection. Accordingly, we hold this requirement is not expressly preempted by sec. 18(b) of the OSH Act and Part 1910.120.

28. But the 4,000-hour directive must also run the implied preemption gauntlet. As we noted above, there are two ways in which state regulation may be impliedly preempted: first, when Congress legislates comprehensively, occupying the entire field of regulation, thus leaving no room for concurrent state prescription. This form of implied preemption is not implicated here. For Congress confined the scope of preemption in sec. 18 of the OSH Act to state regulation covered by a federal standard, and in so doing expressly recognized that the States were free to regulate in areas not covered by a federal standard, *see* 42 U.S.C. sec. 667(a).

29. Second, state law is preempted if it actually conflicts with federal law in that (a) it is impossible to comply with both bodies of law, *or* (b) state law stands as

an obstacle to accomplishment of federal objectives. This form is the issue here.

30. We reemphasize that state regulation of matter within its traditional police powers presumptively is not invalid under the Supremacy Clause. And such state legislation will not be preempted unless the party advancing this position establishes that it was "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accord *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

31. In order to make this determination, it seems obvious that we must be familiar with the administration of this requirement: how will the 4,000-hour requirement be put into practice? National, however, offered no specific evidence demonstrating that it is or will be impossible to comply with this requirement and OSHA regulations, or that this requirement will impair the accomplishment of an objective of federal law. Absent such a showing we are of the view that National has failed to rebut the heavy presumption that this exercise of Illinois' police power is valid.

32. National also argues that the 4,000-hour requirement violates the negative Commerce Clause. U.S. Const. art. 1, sec. 8. The basis for this contention is that implementing this directive will have the practical effect of foreclosing non-residents of Illinois from performing heavy equipment remediation work in Illinois.

33. National also points out that Local 150 of the Operating Engineers' union has kept records of the hours all of its members, all of whom presumably are Illinois

residents, have worked on various pieces of heavy equipment; and therefore that those of Local 150's members who have 4,000 hours of experience on heavy operating equipment easily will be able to provide a "certified record" for licensing purposes.

34. Not so for the employees of National's members, many of whom, according to National, have the experience but not the documentation. Thus, they will be unable to put together the necessary documentation to be licensed under the Operating Engineers Act. This, in turn, amounts to *de facto* discrimination against non-residents of Illinois.

35. We see a major stumbling block in National's path, however: ripeness. National's gripe essentially is that its members' employees will not be able to *comply* with the "certified record" aspect of the 4,000-hour requirement, rather than against the 4,000-hour requirement as such. This presents a factual question. But until the IEPA adopts regulations detailing how this requirement will be implemented it seems to us premature to conclude that this requirement cannot be met by those who have not kept itemized records of their work experience. See, e.g., *American Paper Institute, Inc. v. United States Environmental Protection Agency*, Nos. 88-1395 & 88-1396, slip op. at 17 (7th Cir. Aug. 1, 1989) ("Issues that are fit for judicial decision are purely legal in nature and concern completed matters."). As the IEPA's proposed rules demonstrate, it is not beyond the realm of possibility, for example, that the IEPA will adopt regulations construing "certified record" to mean a sworn statement by an employee (or employer) to the effect that the employee possesses the requisite experience (*see* Proposed Ill. Admin. Reg., Title 35, Subtitle G ch. II, secs. 865.302(a)(6) and 303(a)(7), published on July 11, 1989). Granted, the IEPA

need not choose (or stay with) this course; it may opt for the supporting document approach feared by the plaintiff. We make no suggestion regarding the State's final choice one way or the other; we are convinced, however, that National's Commerce Clause challenge to the 4,000-hour requirement is not ripe for adjudication. Therefore, we dismiss this portion of National's complaint for want of subject matter jurisdiction.

Conclusion

We hold that the provision in the Illinois Acts requiring that persons in the hazardous waste remediation business receive 40 hours of training within Illinois is expressly preempted by sec. 18 of the OSH Act. We also hold that this requirement may be severed from the Acts, thus allowing the remaining sections of the Acts to stand. We therefore strike the words "within Illinois" from secs. 7705(d) and 7805(d).

The requirement that heavy equipment operators provide a certified record that they have 4,000 hours of experience on heavy equipment is not preempted. And National's claim that this requirement violates the negative Commerce Clause is premature.

Enter:

/s/ James B. Zagel
James B. Zagel
United States District Judge

Date: August 14, 1989

CONSTITUTION OF THE UNITED STATES

Article VI, Clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

THE OCCUPATIONAL SAFETY AND HEATH ACT (The OSH Act)

29 U.S.C.A. § 651(b):

§ 651. Congressional statement of findings and declaration of purpose and policy

* * *

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources –

THE OCCUPATIONAL SAFETY AND HEALTH ACT
(The OSH Act)

29 U.S.C.A. § 667

§ 667. State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards

Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986
(SARA)

29 U.S.C.A. § 655 note (West Supp. 1990)

§ 655. Standards

Historical and Statutory Notes

Hazardous Waste Operations. Pub.L. 99-499, Title I, § 126(a)-(f), Oct. 17, 1986, 100 Stat. 1690, as amended Pub.L. 100-202, § 101(f) [Title II], Dec. 22, 1987, 101 Stat. 1329-198, provided that:

"**(a) Promulgation.** – Within one year after the date of the enactment of this section, the Secretary of Labor shall, pursuant to section 6 of the Occupational Safety and Health Act of 1970, promulgate standards for the health and safety protection of employees engaged in hazardous waste operations.

* * *

"(2) **Training.** – Requirements for contractors to provide initial and routine training of workers before such workers are permitted to engage in hazardous waste operations which would expose them to toxic substances.

Hazardous Waste Operations and Emergency Response
OSHA Final Rule, March 6, 1990

29 CFR § 1910.120(a) and (e)

(a) *Scope, application, and definitions* – (1) *Scope.* This section covers the following operations, unless the employer can demonstrate that the operation does not involve employee exposure or the reasonable possibility for employee exposure to safety or health hazards:

(i) Clean-up operations required by a governmental body, whether Federal, state, local or other involving hazardous substances that are conducted at, uncontrolled hazardous waste sites (including, but not limited to, the EPA's National Priority Site List (NPL), state priority site lists, sites recommended for the EPA NPL, and initial investigations of government identified sites which are conducted before the presence or absence of hazardous substances has been ascertained);

(ii) Corrective actions involving clean-up operations at sites covered by the Resources Conservation and Recovery Act of 1976 (RCRA) as amended (42 U.S.C. 6901 *et seq.*);

(iii) Voluntary clean-up operations at sites recognized by Federal, state, local or other governmental bodies as uncontrolled hazardous waste sites;

(iv) Operations involving hazardous wastes that are conducted at treatment, storage, and disposal (TSD) facilities regulated by 40 CFR Parts 264 and 265 pursuant to RCRA; or by agencies under agreement with U.S.E.P.A. to implement RCRA regulations; and

(v) Emergency response operations for releases of, or substantial threats of releases of, hazardous substances without regard to the location of the hazard.

(2) *Application.* (i) All requirements of Part 1910 and Part 1926 of Title 29 of the Code of Federal Regulations apply pursuant to their terms to hazardous waste and emergency response operations whether covered by this section or not. If there is a conflict or overlap, the provision more protective of employee safety and health shall apply without regard to 29 CFR 1910.5(c)(1).

(ii) Hazardous substance clean-up operations within the scope of paragraphs (a)(1)(i) through (a)(1)(iii) of this section must comply with all paragraphs of this section except paragraphs (p) and (q).

(iii) Operations within the scope of paragraph (a)(1)(iv) of this section must comply only with the requirements of paragraph (p) of this section.

Notes and Exceptions: (A) All provisions of paragraph (p) of this section cover any treatment, storage or disposal (TSD) operation regulated by 40 CFR parts 264 and 265 or by state law authorized under RCRA, and required to have a permit or interim status from EPA pursuant to 40 CFR 270.1 or from a state agency pursuant to RCRA.

(B) Employers who are not required to have a permit or interim status because they are conditionally exempt small quantity generators under 40 CFR 261.5 or are generators who qualify under 40 CFR 262.34 for exemptions from regulation under 40 CFR parts 264, 265

and 270 ("excepted employers") are not covered by paragraphs (p)(1) through (p)(7) of this section. Excepted employers who are required by the EPA or state agency to have their employees engage in emergency response or who direct their employees to engage in emergency response are covered by paragraph (p)(8) of this section, and cannot be exempted by (p)(8)(i) of this section. Excepted employers who are not required to have employees engage in emergency response, who direct their employees to evacuate in the case of such emergencies and who meet the requirements of paragraph (p)(8)(i) of this section are exempt from the balance of paragraph (p)(8) of this section.

(C) If an area is used primarily for treatment, storage or disposal, any emergency response operations in that area shall comply with paragraph (p)(8) of this section. In other areas not used primarily for treatment, storage, or disposal, any emergency response operations shall comply with paragraph (q) of this section. Compliance with the requirements of paragraph (q) of this section shall be deemed to be in compliance with the requirements of paragraph (p)(8) of this section.

(iv) Emergency response operations for releases of, or substantial threats of releases of, hazardous substances which are not covered by paragraphs (a)(1)(i) through (a)(1)(iv) of this section must only comply with the requirements of paragraph (q) of this section.

* * *

(e) *Training* – (1) *General.* (i) All employees working on site (such as but not limited to equipment operators,

general laborers and others) exposed to hazardous substances, health hazards, or safety hazards and their supervisors and management responsible for the site shall receive training meeting the requirements of this paragraph before they are permitted to engage in hazardous waste operations that could expose them to hazardous substances, safety, or health hazards, and they shall receive review training as specified in this paragraph.

(ii) Employees shall not be permitted to participate in or supervise field activities until they have been trained to a level required by their job function and responsibility.

(2) *Elements to be covered.* The training shall thoroughly cover the following:

(i) Names of personnel and alternates responsible for site safety and health;

(ii) Safety, health and other hazards present on the site;

(iii) Use of personal protective equipment;

(iv) Work practices by which the employee can minimize risks from hazards;

(v) Safe use of engineering controls and equipment of the site;

(vi) Medical surveillance requirements, including recognition of symptoms and signs which might indicate overexposure to hazards; and

(vii) The contents of paragraphs (G) through (J) of the site safety and health plan set forth in paragraph (b)(4)(ii) of this section.

(3) *Initial training.* (i) General site workers (such as equipment operators, general laborers and supervisory personnel) engaged in hazardous substance removal or other activities which expose or potentially expose workers to hazardous substances and health hazards shall receive a minimum of 40 hours of instruction off the site, and a minimum of three days actual field experience under the direct supervision of a trained, experienced supervisor.

(ii) Workers on site only occasionally for a specific limited task (such as, but not limited to, ground water monitoring, land surveying, or geo-physical surveying) and who are unlikely to be exposed over permissible exposure limits and published exposure limits shall receive a minimum of 24 hours of instruction off the site, and the minimum of one day actual field experience under the direct supervision of a trained, experience supervisor.

(iii) Workers regularly on site who work in areas which have been monitored and fully characterized indicating that exposures are under permissible exposure limits and published exposure limits where respirators are not necessary, and the characterization indicates that there are no health hazards or the possibility of an emergency developing, shall receive a minimum of 24 hours of instruction off the site and the minimum of one day actual field experience under the direct supervision of a trained, experienced supervisor.

(iv) Workers with 24 hours of training who are covered by paragraphs (e)(3)(ii) and (e)(3)(iii) of this section, and who become general site workers or who are

required to wear respirators, shall have the additional 16 hours and two days of training necessary to total the training specified in paragraph (e)(3)(i).

(4) *Management and supervisor training.* On-site management and supervisors directly responsible for, or who supervise employees engaged in, hazardous waste operations shall receive 40 hours initial training, and three days of supervised field experience (the training may be reduced to 24 hours and one day if the only area of their responsibility is employees covered by paragraphs (e)(3)(ii) and (e)(3)(iii)) and at least eight additional hours of specialized training at the time of job assignment on such topics as, but not limited to, the employer's safety and health program and the associated employee training program, personal protective equipment program, spill containment program, and health hazard monitoring procedure and techniques.

(5) *Qualifications for trainers.* Trainers shall be qualified to instruct employees about the subject matter that is being presented in training. Such trainers shall have satisfactorily completed a training program for teaching the subjects they are expected to teach, or they shall have the academic credentials and instructional experience necessary for teaching the subjects. Instructors shall demonstrate competent instructional skills and knowledge of the applicable subject matter.

(6) *Training certification.* Employees and supervisors that have received and successfully completed the training and field experience specified in paragraphs (e)(1) through (e)(4) of this section shall be certified by their instructor or the head instructor and trained supervisor as having successfully completed the necessary training.

A written certificate shall be given to each person so certified. Any person who has not been so certified or who does not meet the requirements of paragraph (e)(9) of this section shall be prohibited from engaging in hazardous waste operations.

(7) *Emergency response*. Employees who are engaged in responding to hazardous emergency situations at hazardous waste clean-up sites that may expose them to hazardous substances shall be trained in how to respond to such expected emergencies.

(8) *Refresher training*. Employees specified in paragraph (e)(1) of this section, and managers and supervisors specified in paragraph (e)(4) of this section, shall receive eight hours of refresher training annually on the items specified in paragraph (e)(2) and/or (e)(4) of this section, any critique of incidents that have occurred in the past year that can serve as training examples of related work, and other relevant topics.

(9) *Equivalent training*. Employers who can show by documentation or certification that an employee's work experience and/or training has resulted in training equivalent to that training required in paragraphs (e)(1) through (e)(4) of this section shall not be required to provide the initial training requirements of those paragraphs to such employees. However, certified employees or employees with equivalent training new to a site shall receive appropriate, site specific training before site entry and have appropriate supervised field experience at the new site. Equivalent training includes any academic training or the training that existing employees might have already received from actual hazardous waste site work experience.

ILLINOIS HAZARDOUS WASTE CRANE AND HOISTING EQUIPMENT OPERATORS LICENSING ACT

Ill. Rev. Stat. 1989, ch. 111, ¶¶ 7701-7717

AN ACT in relation to environmental protection. P.A. 85-1195, Art. I, approved Aug. 23, 1988, eff. March 1, 1989.

7701. Short title

§ 1. This Article shall be known and may be cited as the Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act, and throughout this Article, references to this Act shall mean this Article.

7702. Legislative findings

§ 2. The General Assembly finds that to promote job safety and to protect life, limb and property, the State of Illinois should license persons who operate or assist in the operation of crane and hoisting equipment which is involved with the disposal, clean-up or handling of hazardous waste.

7703. Definitions

§ 3. For the purposes of this Act, unless the context otherwise requires:

(a) "Agency" means the Environmental Protection Agency.

(b) "Crane" means any hoisting equipment that lifts and rotates or moves a load horizontally or vertically,

including: hydraulic back hoes, hydraulic cranes, friction cranes, derricks, jib joists, gantry, bridge cranes, floating cranes of any type and air-borne hoisting equipment.

(c) "Hoist" includes, but is not limited to, a material hoist (construction elevator), air tugger (one drum), multidrum hoist, overhead hoist, sideboom, A-Frame boom truck or behind the cab truck mounted boom.

(d) "Director" means the Director of the Environmental Protection Agency.

(e) "Hazardous waste" means a hazardous waste as defined in Section 3.15 of the Environmental Protection Act,[1] except asbestos.

(f) "Facility" means a regional pollution control facility as defined in Section 3.32 of the Environmental Protection Act,[2] or a site undergoing cleanup pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended,[3] or Section 22.2 of the Illinois Environmental Protection Act.[4]

7704. Necessity of license – Application of act

§ 4. (a) It shall be unlawful for any person to operate any crane or hoist driven by any power when

---

[1] Chapter 111½, ¶ 1003.15.

[2] Chapter 111½, ¶ 1003.32.

[3] 42 U.S.C.A. § 9601 et seq.

[4] Chapter 111½, ¶ 1022.2.

used in lowering or hoisting personnel or materials involving the disposal, cleanup or handling of hazardous waste at a facility without first obtaining an operator's license from the Agency.

(b) It shall be unlawful for any person to assist in the operation of a crane or hoist driven by any power when used in lowering or hoisting personnel or materials involving the disposal, cleanup or handling of hazardous waste at a facility without first obtaining an apprentice's license from the Agency.

(c) This Act does not apply to operators of hoisting equipment with a lifting capacity of 2 tons or less, commonly known as forklifts of bobcats, or equipment involved in grading, drainage, field tile, irrigation or other activity connected with agriculture or farming.

(d) This Act does not apply to any activities associated with any excavation for the discovery, development, or production of: minerals, coal or other substances, and oil, gas and water.

(e) This Act does not apply to an employee of a railroad who operates or assists in the operation of a crane or hoist.

(f) This Act does not apply to any employee of the owner, operator or principal responsible party of a manufacturing facility undergoing cleanup pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended,[1] or Section 22.2 of the Illinois Environmental Protection Act,[2]

---

[1] 42 U.S.C.A. § 9601 et seq.

[2] Chapter 111½, ¶ 1022.2.

or a regional pollution control facility engaged in the practice of recycling hazardous waste, if the employee has undergone the training required by OSHA Hazardous Waste Operations and Emergency Response, 29 CFR Part 1910.120, subparagraph (h).

7705. Operator license

§ 5. A person is qualified to obtain an operator's license under this Act:

(a) who is at least 18 years of age;

(b) who has not violated any of the provisions of this Act for which disciplinary action could be taken;

(c) who had submitted a certified record of 40 hours or more of training to work with hazardous waste in a training program located within the State of Illinois which has been approved by either the Agency or the U.S. Environmental Protection Agency;

(d) who has submitted a certified record showing operation of equipment used in hazardous waste handling for a minimum of 4,000 hours; and

(e) who has passed a written examination authorized by the Agency.

7706. Apprentice license

§ 6. A person is qualified to obtain an apprentice's license under this Act:

(a) who is at least 18 years of age;

(b) who has not violated any of the provisions of this Act for which disciplinary action could be taken;

(c) who has submitted a certified record of 40 hours or more of training to work with hazardous waste in a training program located within the State of Illinois which has been approved by either the Agency or the U.S. Environmental Protection Agency; and

(d) who has passed a written examination prescribed by the Agency.

7707. Applications for original licenses – Examination – Renewal

§ 7. (a) Applications for original licenses shall be made to the Agency in writing on forms prescribed by the Agency and shall be accompanied by the required fee, which shall not be returnable. Any such application shall require such information as in the judgment of the Agency will enable the Agency to pass on the qualifications of the applicant for a license.

The Agency shall authorize examinations of applicants at such times and places as it may determine. The examination of applicants shall be of a character to give a fair test of the qualifications of the applicant to practice.

Applicants for examination shall be required to pay, either to the Agency or the designated testing service, a fee covering the cost of providing the examination. Failure to appear for the examination on the scheduled date, at the time and place specified, after the applicant's application for examination has been received and acknowledged by the Agency or the designated testing

service, shall result in the forfeiture of the examination fee.

If an applicant neglects, fails or refuses to take an examination or fails to pass an examination for a license under this Act within 3 years after filing his application, the application is denied. However, such applicant may thereafter make a new application accompanied by the required fee. The Agency may employ consultants for the purpose of preparing and conducting examinations.

(b) Licenses shall be valid for a period of one year. Renewal of a license shall require completion of a refresher course, approved by the Agency, including at least 8 hours of instruction, before the renewal is granted.

7708. Fees – Fund

§ 8. (a) The Agency shall impose a $50.00 fee for any original license issued under this Act.

The Agency shall impose a $20.00 per year fee for the renewal of a license issued under this Act.

(b) All fees received by the Agency pursuant to this Section shall be deposited into the Hazardous Waste Occupational Licensing Fund. Moneys in the Fund may be used by the Agency, pursuant to appropriation, for the administration of this Act.

Amended by P.A. 85-1441, § 1, eff. Mar. 1, 1989; P.A. 86-820, Art. II, § 2-16, eff. Sept. 7, 1989.

P.A. 86-820, Art. II, § 2.16, indicated by reference the Public Act which may be relied on to contain the complete current text of paragraphs affected by multiple actions in P.A. 85-1427 through P.A. 85-1451.

7709. Board

§ 9. (a) There is hereby created within the Agency, a Hazardous Waste Crane and Hoisting Equipment Operators' Licensing Board (hereinafter referred to as the "Board").

The Board shall consist of 5 members appointed by the Director.

Two members of the Board shall be members of unions representing operating engineers, two shall be representatives of the hazardous waste disposal industry and 1 shall be a public member.

Board members shall be appointed for 4 year terms and shall receive no compensation for their services on the Board, but may be reimbursed for their actual expenses in serving on the Board.

(b) The Board shall annually elect one of its members as chairman, one as vice chairman and one as secretary. No officer of the Board shall be elected more than twice in succession to the same office. Each officer shall serve until his successor has been elected and qualified.

(c) Three members of the Board shall constitute a quorum. A vacancy in the membership of the Board shall not impair the right of a quorum to exercise all the rights and perform all the duties of the Board.

(d) The Board shall make recommendations to the Director concerning any aspect of licensing under this Act. The Board shall advise the crane inspector on matters relating to his duties under this Act.

7710. Crane inspector

§ 10. The Director shall appoint a Crane Inspector for a 4 year term. The Crane Inspector shall:

(a) assist the Board in carrying out its duties under this Act;

(b) periodically inspect cranes involved with hazardous waste cleanup or disposal;

(c) investigate accidents involving hoisting equipment which occur at hazardous waste cleanup job sites;

(d) inspect hazardous waste cleanup job sites to insure that all crane and hoisting equipment personnel are properly licensed.

7711. Disciplinary action

§ 11. The Agency may refuse to issue or to renew, or may revoke, suspend, place on probation, censure or reprimand a licensee, or impose fines not to exceed $5,000 for any one or a combination of the following causes:

(a) The practice of any fraud or deceit in obtaining or attempting to obtain a license;

(b) Any gross negligence, incompetency or misconduct in the practices as an operator of hoisting equipment or the operation of hoisting equipment involving the disposal, cleanup or handling of hazardous waste at a facility while under the influence of alcohol or other drugs;

(c) Any gross negligence, incompetency or misconduct in the practice as an apprentice assisting in the

operation of hoisting equipment or assisting in the operation of hoisting equipment involving the disposal, cleanup or handling of hazardous waste at a facility while under the influence of alcohol or other drugs;

(d) Conviction in this or another State of any crime which is a felony under the laws of this State or conviction of a felony in a federal court, if the Agency determines, after investigation, that such person has not been sufficiently rehabilitated to warrant the public trust;

(e) The entry of an order by any circuit court establishing that any person holding a license under this Act is a person subject to involuntary admission under the Mental Health and Developmental Disabilities Code.[1] The person may have his license restored only upon the determination by a circuit court that he is recovered from the mental illness which subjected him to involuntary admission and upon the determination of the Agency that the license be restored. Where the circumstances so indicate, the Agency may require an examination prior to restoring any license;

(f) Failure to comply with any of the provisions of this Act or any of the rules of the Agency pertaining thereto;

(g) Revocation or suspension of a license as a crane or hoisting equipment operator or apprentice in another state;

(h) Failure within 60 days, to provide information requested by the Agency as the result of a formal or

---

[1] Chapter 91½, ¶ 1-100 et seq.

informal complaint to the Agency which would indicate a violation of this Act.

The Agency may refuse to issue or may suspend the license of any person who fails to file a return or to pay the tax, penalty or interest shown in a filed return or to pay any final assessment of tax, penalty or interest, as required by any tax Act administered by the Illinois Department of Revenue, until such time as the requirements of any such tax Act are satisfied.

7712. Investigation – Hearing

§ 12. The Agency may upon its own motion and shall upon the sworn complaint in writing of any person setting forth charges which, if proved, would constitute grounds for refusal, suspension or revocation of a license as hereinabove set forth, investigate the actions of any person holding or claiming to hold a license.

The Agency shall, before refusing to issue, suspend or revoke any license at least 10 days prior to the date set for the hearing, notify the applicant or holder of the license, in writing, of any charges made, and shall afford him an opportunity to be heard in person or by counsel in reference thereto. Such notice may be served by its delivery personally to the accused person, or by mailing it by registered mail to the place of business last theretofore specified by the accused person in his last notification to the Agency. At the time and place fixed in the notice, the Board shall proceed to the hearing of the charges and both the accused person and the complainant shall be accorded ample opportunity to present in person or by

counsel, such statement, testimony, evidence and argument as may be pertinent to the charges or to any defense thereto. The Board may continue such hearing from time to time. If the Board is not sitting at the time and place to which the hearing has been continued, the Agency may continue the hearing for a period not to exceed 30 days, and notice in writing shall be given to all parties in interest of the date and hour to which the hearing has been continued, and the place at which it is to be held.

7713. Review under Administrative Review Law – Venue.

§ 13. All final administrative decisions of the Agency hereunder shall be subject to judicial review pursuant to the provisions of the Administrative Review Law.[1] and all amendments and modifications thereof, and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.[2]

Such proceedings for judicial review shall be commenced in the circuit court of the county in which the party applying for review resides; provided, that if such party is not a resident of this State, the venue shall be in Sangamon County.

The Agency shall not be required to certify any record to the court or file any answer in court or otherwise appear in any court in a judicial review proceeding,

---

[1] Chapter 110, ¶ 3-101 et seq.

[2] Chapter 110, ¶ 3-101.

unless there is filed in the court with the complaint a receipt from the Agency acknowledging payment of the costs of furnishing and certifying the record which costs shall be computed at the rate of 20 cents per page of such record. Exhibit shall be certified without cost. Failure on the part of the Plaintiff to file such receipt in court shall be grounds for dismissal of the action.

7714. Unlawful operation – Injunctions

§ 14. Operating or assisting in the operation of a cane or hoist involving the disposal, cleanup or handling of hazardous waste at a facility in this State or an offer to so practice, or to use, advertise or otherwise represent to the public any title or description implying that one is a crane or hoisting equipment operator or apprentice licensed to dispose, clean up or handle hazardous waste at a facility by any person not at that time holding a valid and current license under this Act is declared to be inimical to the public welfare and to constitute a public nuisance. The Attorney General for the State of Illinois, the Director of the Environmental Protection Agency, the State's Attorney for any county in the State, or any resident citizen may maintain an action in the name of the people of the State of Illinois to perpetually enjoin any person from so unlawfully operating as a crane or hoisting equipment operator or apprentice and from the doing, committing or continuing of any such unlawful act. In all proceedings hereunder the court, in its discretion, may apportion the costs among the parties interested in the suit, including cost of filing complaint, service of process, witness fees and expenses, court reporter charges, and reasonable attorneys' fees. This

proceeding is in addition to and not in lieu of criminal prosecution.

7715. Operation without operator's license – Penalties

§ 15. (a) Any person who operates a crane or a hoist involving the disposal, cleanup or handling of hazardous waste at a facility without obtaining an operator's license under this Act from the Agency shall be guilty of a business offense and for the first violation shall be fined not more than $1,000, for a second violation shall be fined not more than $3,000 and for a third or subsequent conviction shall be fined not less than $5,000.

(b) Any employer contractor or agent who knowingly permits any individual to operate a crane or a hoist involving the disposal, cleanup or handling of hazardous waste at a facility without such individual holding a valid operator's license issued under this Act shall be guilty of a Class A misdemeanor and may be fined not more than $1,000 for the first offense, no less than $3,000 for the second offense or fined no less than $5,000 for a third or subsequent offense.

7716. Assisting without apprentice's license – Penalties

§ 16. (a) Any person who assists in the operation of a crane or hoist involving the disposal, cleanup or handling of hazardous waste at a facility, without obtaining an apprentice's license under this Act from the Agency shall be guilty of a business offense and for the first violation shall be fined not more than $1,000, for a

second violation shall be fined not more than $3,000 and for a third or subsequent conviction shall be fined not less than $5,000.

(b) Any employer, contractor or agent who knowingly permits any individual to assist in the operation of a crane or hoist involving the disposal, cleanup or handling of hazardous waste at a facility without such individual holding a valid apprentice's license issued under this Act shall be guilty of a Class A misdemeanor and may be fined not more than $1,000 for the first offense, no less than $3,000 for the second offense or fined no less than $5,000 for a third or subsequent offense.

7717. Administration of Act.

§ 17. The Agency shall exercise the power and duties prescribed by The Civil Administrative Code of Illinois[1] for the administration of licensing Acts and shall exercise such other powers and duties and invested by this Act.

The Director may promulgate rules consistent with the provisions of this Act, for the administration and enforcement thereof and may provide forms which shall be issued in connection therewith.

---

[1] Chapter 127, ¶ 1 et seq.

ILLINOIS HAZARDOUS WASTE LABORERS LICENSING ACT

Ill. Rev. Stat. 1989, ch. 111, ¶¶ 7801-7815.

AN ACT in relation to environmental protection. P.A. 85-1195, Art. II, approved Aug. 23, 1988, eff. March 1, 1989.

7801. Short title

§ 1. This Article shall be known and may be cited as the Hazardous Waste Laborers Licensing Act, and throughout this Article, references to this Act shall mean this Article.

7802. Legislative findings

§ 2. The General Assembly finds that to promote job safety and to protect life, limb and property, the State of Illinois should license laborers involved with the disposal, cleanup or handling of hazardous waste.

7803. Definitions

§ 3. For the purposes of this Act, unless the context otherwise requires:

(a) "Agency" means the Environmental Protection Agency.

(b) "Director" means the Director of the Environmental Protection Agency.

(c) "Laborer" means a person who (1) erects, moves, services and dismantles scaffolds and barricades at a

facility; (2) constructs, erects, removes and dismantles enclosures, chambers or decontamination units required for the removal or containment of hazardous waste at a facility; (3) labels, bags, cartons or otherwise packages hazardous waste for disposal; and (4) cleans up the work site and performs other work incidental to the removal, abatement or encapsulation of hazardous waste.

(d) "Hazardous waste" means a hazardous waste as defined in Section 3.15 of the Environmental Protection Act,[1] except asbestos.

(e) "Facility" means a regional pollution control facility as defined in Section 3.32 of the Environmental Protection Act,[2] or a site undergoing cleanup pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended,[3] or Section 22.2 of the Illinois Environmental Protection Act.[4]

7804. Necessity of license – Application of act

§ 4. (a) It shall be unlawful for any person to perform any of the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility without first obtaining a laborer's license from the Agency.

---

[1] Chapter 111½, ¶ 1003.15.

[2] Chapter 111½, ¶ 1003.32.

[3] 42 U.S.C.A. § 9601 et seq.

[4] Chapter 111½, ¶ 1022.2.

(b) This Act does not apply to operators of hoisting equipment with a lifting capacity of 2 tons or less, commonly known as forklifts or bobcats, or equipment involved in grading, drainage, field tile, irrigation or other activity connected with agriculture or farming.

(c) This Act does not apply to any activities associated with any excavation for the discovery, development, or production of: minerals, coal or other substances, and oil, gas and water.

(d) This Act does not apply to an employee of a railroad who operates or assists in the operation of a crane or hoist.

(e) This Act does not apply to any employee of the owner, operator or principal responsible party of a manufacturing facility undergoing cleanup pursuant to either the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended,[1] or Section 22.2 of the Illinois Environmental Protection Act,[2] or a regional pollution control facility engaged in the practice of recycling hazardous waste, if the employee has undergone the training required by OSHA Hazardous Waste Operations and Emergency Response, 29 CFR Part 1910.120, subparagraph (h).

7805. License qualifications

§ 5. A person is qualified to obtain a laborer's license under this Act:

---

[1] 42 U.S.C.A. § 9601 et seq.

[2] Chapter 111½, ¶ 1022.2.

(a) who is at least 18 years of age;

(b) who has not violated any of the provisions of this Act for which disciplinary action could be taken;

(c) who has submitted a certified record of 40 hours or more of training to work with hazardous waste in a training program located within the State of Illinois which has been approved by either the Agency or the U.S. Environmental Protection Agency; and

(d) who has passed a written examination authorized by the Agency.

7806. Applications for original licenses – Examination – Renewal

§ 6. (a) Applications for original licenses shall be made to the Agency in writing on forms prescribed by the Agency and shall be accompanied by the required fee, which shall not be returnable. Any such application shall require such information as in the judgment of the Agency will enable the Agency to pass on the qualifications of the applicant for a license.

The Agency shall authorize examinations of applicants at such times and places as it may determine. The examination of applicants shall be of a character to give a fair test of the qualifications of the applicant to practice.

Applicants for examination shall be required to pay, either to the Agency or the designated testing service, a fee covering the cost of providing the examination. Failure to appear for the examination on the scheduled date, at the time and place specified, after the applicant's application for examination has been received and

acknowledged by the Agency or the designated testing service, shall result in the forfeiture of the examination fee.

If an applicant neglects, fails or refuses to take an examination or fails to pass an examination for a license under this Act within 3 years after filing his application, the application is denied. However, such applicant may thereafter make a new application accompanied by the required fee. The Agency may employ consultants for the purpose of preparing and conducting examinations.

(b) Licenses shall be valid for a period of one year. Renewal of a license shall require completion of a refresher course, approved by the Agency, including at least 8 hours of instruction, before the renewal is granted.

7807. Fees – Fund

§ 7. (a) The Agency shall impose a $50.00 fee for any original license issued under this Act.

The Agency shall impose a $20.00 per year fee for the renewal of a license issued under this Act.

(b) All fees received by the Agency pursuant to this Section shall be deposited into the Hazardous Waste Occupational Licensing Fund. Moneys in the Fund may be used by the Agency, pursuant to appropriation, for the administration of this Act.

Amended by P.A. 85-1441, § 2, eff. Mar. 1, 1989; P.A. 86-820, Art. II, § 2-16, eff. Sept. 7, 1989.

P.A. 86-820, Art. II, § 2-16, indicated by reference the Public Act which may be relied on to contain the complete current text of paragraphs affected by multiple actions in P.A. 85-1427 through P.A. 85-1451.

7808. Board

§ 8. (a) There is hereby created within the Agency, a Hazardous Waste Laborers' Licensing Board (hereinafter referred to as the "Board").

The Board shall consist of 5 members appointed by the Director.

Two members of the Board shall be members of unions representing laborers, two shall be representatives of the hazardous waste disposal industry, and 1 shall be a public member.

Board members shall be appointed for 4 year terms and shall receive no compensation for their services on the Board, but may be reimbursed for their actual expenses in serving on the Board.

(b) The Board shall annually elect one of its members as chairman, one as vice chairman and one as secretary. No officer of the Board shall be elected more than twice in succession to the same office. Each officer shall serve until his successor has been elected and qualified.

(c) Three members of the Board shall constitute a quorum. A vacancy in the membership of the Board shall not impair the right of a quorum to exercise all the rights and perform all the duties of the Board.

(d) The Board shall make recommendations to the Director concerning any aspect of licensing under this

Act. The Board shall advise the Laborer Inspector on matters relating to his duties under this Act.

7809. Laborer inspector

§ 9. The Director shall appoint a Laborer Inspector for a 4 year term. The Laborer Inspector shall:

(a) assist the Board in carrying out its duties under this Act;

(b) investigate accidents involving laborers which occur at hazardous waste cleanup job sites;

(c) inspect hazardous waste cleanup job sites to insure that all personnel performing the duties of laborers are properly licensed.

7810. Disciplinary action

§ 10. The Agency may refuse to issue or to renew, or may revoke, suspend, place on probation, censure or reprimand a licensee, or impose fines not to exceed $5,000 for any one or a combination of the following causes:

(a) The practice of any fraud or deceit in obtaining or attempting to obtain a license;

(b) Any gross negligence, incompetency or misconduct in performing the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility while under the influence of alcohol or other drugs;

(c) Conviction in this or another State of any crime which is a felony under the laws of this State or conviction of a felony in a federal court, if the Agency determines, after investigation, that such person has not been sufficiently rehabilitated to warrant the public trust;

(d) The entry of an order by any circuit court establishing that any person holding a license under this Act is a person subject to involuntary admission under the Mental Health and Developmental Disabilities Code.[1] The person may have his license restored only upon the determination by a circuit court that he is recovered from the mental illness which subjected him to involuntary admission and upon the determination of the Agency that the license be restored. Where the circumstances so indicate, the Agency may require an examination prior to restoring any license;

(e) Failure to comply with any of the provisions of this Act or any of the rules of the Agency pertaining thereto;

(f) Revocation or suspension of a license as a laborer in another state;

(g) Failure within 60 days, to provide information requested by the Agency as the result of a formal or informal complaint to the Agency which would indicate a violation of this Act.

The Agency may refuse to issue or may suspend the license of any person who fails to file a return or to pay the tax, penalty or interest shown in a filed return or to

---

[1] Chapter 91½, ¶ 1-100 et seq.

pay any final assessment of tax, penalty or interest, as required by any tax Act administered by the Illinois Department of Revenue, until such time as the requirements of any such tax Act are satisfied.

7811. Investigation – Hearing

§ 11. The Agency may upon its own motion and shall upon the sworn complaint in writing of any person setting forth charges which, if proved, would constitute grounds for refusal, suspension or revocation of a license as herein above set forth, investigate the actions of any person holding or claiming to hold a license.

The Agency shall, before refusing to issue, suspend or revoke any license at least 10 days prior to the date set for the hearing, notify the applicant or holder of the license, in writing, of any charges made, and shall afford him an opportunity to be heard in person or by counsel in reference thereto. Such notice may be served by its delivery personally to the accused person, or by mailing it by registered mail to the place of business last theretofore specified by the accused person in his last notification to the Agency. At the time and place fixed in the notice, the Board shall proceed to the hearing of the charges and both the accused person and the complainant shall be accorded ample opportunity to present in person or by counsel, such statement, testimony, evidence and argument as may be pertinent to the charges or to any defense thereto. The Board may continue such hearing from time to time. If the Board is not sitting at the time and place to which the hearing has been continued, the Agency may continue the hearing for a period not to exceed 30 days,

and notice in writing shall be given to all parties in interest of the date and hour to which the hearing has been continued, and the place at which it is to be held.

7812. Review under Administrative Review Law – Venue

§ 12. All final administrative decisions of the Agency hereunder shall be subject to judicial review pursuant to the provisions of the Administrative Review Law, and all amendments and modifications thereof,[1] and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.[2]

Such proceedings for judicial review shall be commenced in the circuit court of the county in which the party applying for review resides; provided, that if such party is not a resident of this State, the venue shall be in Sangamon County.

The Agency shall not be required to certify any record to the court or file any answer in court or otherwise appear in any court in a judicial review proceeding, unless there is filed in the court with the complaint a receipt from the Agency acknowledging payment of the costs of furnishing and certifying the record which costs shall be computed at the rate of 20 cents per page of such record. Exhibit shall be certified without cost. Failure on the part of the Plaintiff to file such receipt in court shall be grounds for dismissal of the action.

---

[1] Chapter 110, ¶ 3-101 et seq.

[2] Chapter 110, ¶ 3-101.

7813. Unlawful operation as laborer – Injunctions

§ 13. Performing the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility in this State or an offer to so practice, or to use, advertise or otherwise represent to the public any title or description implying that one is a laborer licensed to dispose, clean up or handle hazardous waste at a facility, by any person not at that time holding a valid and current license under this Act, is declared to be inimical to the public welfare and to constitute a public nuisance. The Attorney General for the State of Illinois, the Director of the Environmental Protection Agency, the State's Attorney for any county in the State, or any resident citizen may maintain an action in the name of the people of the State of Illinois to perpetually enjoin any person from so unlawfully operating as a laborer and from the doing, committing or continuing of any such unlawful act. In all proceedings hereunder the court, in its discretion, may apportion the costs among the parties interested in the suit, including cost of filing complaint, service of process, witness fees and expenses, court reporter charges, and reasonable attorneys' fees. This proceeding is in addition to and not in lieu of criminal prosecution.

7814. Performing duties of laborer without license – Penalties

§ 14. (a) Any person who performs the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility without obtaining a laborer's license under this Act from the Agency shall be

guilty of a business offense and for the first violation shall be fined not more than $1,000, for a second violation shall be fined not more than $3,000 and for a third or subsequent conviction shall be fined not less than $5,000.

(b) Any employer, contractor or agent who knowingly permits any individual to perform the duties of a laborer involving the disposal, cleanup or handling of hazardous waste at a facility without such individual holding a valid laborer's license issued under this Act shall be guilty of a Class A misdemeanor and may be fined not more than $1,000 for the first offense, no less than $3,000 for the second offense or fined no less than $5,000 for a third or subsequent offense.

7815. Administration of Act

§ 15. The Agency shall exercise the power and duties prescribed by The Civil Administrative Code of Illinois[1] for the administration of licensing Acts and shall exercise such other powers and duties invested by this Act.

The Director may promulgate rules consistent with the provisions of this Act, for the administration and enforcement thereof and may prescribe forms which shall be issued in connection therewith.

---

[1] Chapter 127, ¶ 1 et seq.